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NOMINATION OF JUSTICE WILLIAM HUBBS REHNQUIST

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON THE

NOMINATION OF JUSTICE WILLIAM HUBBS REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

JULY 29, 30, 31, AND AUGUST 1, 1986

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NOMINATION OF JUSTICE WILLIAM HUBBS REHNQUIST

TUESDAY, JULY 29, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 4:30 p.m., in room SD-106, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Biden, Hatch, Heflin, McConnell, Specter, Grassley, Leahy, Metzenbaum, Laxalt, Kennedy, Simpson, Broyhill, Mathias, DeConcini, Simon, and Denton.

Staff present: Dennis Shedd, chief counsel and staff director; Duke Short, chief investigator; Frank Klonoski, investigator; Reginald Govan, minority investigator; Mark Gitenstein, minority chief counsel; Cindy Lebow, minority staff director; Melinda Koutsoumpas, chief clerk; and Jack Mitchell, investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

The Honorable Warren E. Burger has announced his resignation as Chief Justice of the United States. Chief Justice Burger has run a long and distinguished service to this country. Our Nation has greatly benefited from his dedicated and capable leadership of the Court.

The President has nominated Justice William Hubbs Rehnquist to replace Chief Justice Burger. This afternoon we begin our consideration of the nomination of Justice Rehnquist to be the 16th Chief Justice of the United States.

Several years ago during the nomination hearings on Justice Sandra Day O'Connor I outlined the qualities I believe a Supreme Court Justice should possess:

Unquestioned integrity—honesty, incorruptibility, fairness;

Courage—the strength to render decisions in accordance with the Constitution and the will of the people as expressed in the laws of Congress;

A keen knowledge and understanding;

Compassion—which recognizes both the rights of the individual and the rights of society in the quest for equal justice under law;

Proper judicial temperament—the ability to prevent the pressures of the moment from overcoming the composure and self-discipline of a well ordered mind; and

An understanding of, and appreciation for, the majesty of our system of government—in its separation of powers between the branches of our Federal Government, its division of powers between the Federal and State governments, and the reservation to the States and to the people all powers not delegated to the Federal Government.

In his almost 15 years on the Supreme Court, Justice Rehnquist has displayed these qualities. He is widely acknowledged as a formidable scholar and articulate judge. His ability and intellect, his understanding of the role of the judiciary, and his performance as a member of the Supreme Court are exemplary.

Today, we begin the historic task of reviewing the nomination of Justice Rehnquist to undertake the duties and responsibilities of Chief Justice of the United States, a position many have called first among equals.

When one thinks of the duties of the Chief Justice, his more visible responsibilities with the Supreme Court immediately come to mind. He is the symbol of the Court. He administers the oath of office to the President. He presides over public sessions and Court conferences, and he assigns the writing of Court opinions when he is in the majority. However, the Chief Justice has many other responsibilities.

One of his greatest is to head the Federal court system. This alone has become a massive task. Overseeing 692 active judges, 267 senior judges, and almost 3,000 support staff, the Chief Justice also makes hundreds of judicial assignments and generally appoints members of special or temporary courts. Additionally, the Chief Justice handles personnel and securities matters for the Court. In fact, Chief Justice Burger has stated that administrative responsibilities consume one-third of his time.

While the responsibilities of the office of Chief Justice are enormous, it has been said that the real eminence of this position comes not from the office itself but from the qualities a person brings to it. Of all the attributes one could bring to this job, perhaps the most critical is that mysterious quality called leadership. In this regard, Justice Rehnquist's record is outstanding. His leadership ability comes not only from a keen intellect and knowledge of the law but is also based on an understanding of the Court and the entire judicial system learned through active participation.

Justice Rehnquist has experience with almost every aspect of the American judicial system. He has appeared before the State courts of Arizona, and he has practiced before the Federal courts at the district, circuit, and Supreme Court levels. He has also served as an Assistant Attorney General in the Department of Justice, which is the executive department most closely involved with judicial issues.

His keen understanding of the Supreme Court has been nurtured and refined as a law clerk, as an author-commentator of the Court, and as a Justice for 14½ years. It is difficult to imagine a background which would result in a more complete understanding and thorough knowledge of the court.

Justice Rehnquist, we welcome you, again, to the committee along with your wife Nan and your family, and congratulate you on the honor President Reagan has bestowed upon you.

Before calling upon the panel of distinguished Senators and before the introductory remarks of Justice Rehnquist, each member of the committee will be recognized for brief opening remarks.

The Chair now recognizes the distinguished ranking minority member, Senator Joseph Biden of Delaware.

Senator Biden.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator **Biden**. Thank you, Mr. Chairman.

Welcome, Justice Rehnquist and your family.

To state the obvious, this is truly a historic occasion not only for the nominee but for the committee and the Senate as a whole, for we must decide on behalf of the American people who will lead the third and I am emphasize coequal branch of our National Government, not simply for some legislative period or a presidential term but as an appointee for life, almost certainly and hopefully well into the next century. Our decision on this great question may be as important or more important than the selection of the President of the United States of America.

The Chief Justice not only serves longer than any President but also with his colleagues on the Court exercises the power limited only by conscience and principle.

And that power goes to the very heart and character of our Nation as a republic, and in the end, it's that power that determines whether or not we are a government of laws or a government of men.

This is, therefore, perhaps the most awesome responsibility we will face on this committee, and I suspect as Members of the U.S. Senate.

It requires all of us to have the most searching inquiry and the utmost candor, not only because it is a responsibility that the Constitution imposes upon us but also because of the consequences our decision will have inevitably, if not altogether predictably, upon our future as a Nation.

In our two centuries as a republic, 40 men have served as President of the United States of America, and scores as leaders of the legislative branches, but only 15 have donned the robes of Chief Justice of the U.S. Supreme Court. Only 15 people.

The men who have been entrusted with this highest office are among the greatest in our history—John Jay, John Marshall, Roger Taney, William Howard Taft, Charles Evans Hughes, Harlan Fiske Stone, Earl Warren are among those who preceded Warren Burger to the chair of Chief Justice.

And we've long been in the habit of recognizing the impact of Chief Justices not only upon our law but upon our whole society. This is evident by the way in which we refer to eras in the Court's history by the names of the Chief Justice. For example, the Marshall Court is often referred to or the Warren Court.

An effective Chief Justice is the fulcrum upon which the decisions of the Court largely turn, and there is no doubt that the Supreme Court has been at the crux of the major changes that have swept our society over the past 200 years precisely because we have attempted to conduct a government of laws.

And that reflects not only on the nature of our Government but also the nature of the American people.

As Alexis De Tocqueville, the keenest of observers of American politics and the American character pointed out 150 years ago, and I quote: "scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question."

Our history both before and after De Tocqueville's time has amply confirmed his judgment just as it emphasizes the central role of the Chief Justice of the Supreme Court, the third coequal branch of the Government.

The greatest among these Chief Justices, in my opinion, John Marshall, crafted the most powerful defense of a constitutional system of government ever written and firmly establish the key role of the Supreme Court in defending the Constitution in his famous *Marbury* v. *Madison* opinion.

Marshall's successor, Roger Taney, led a divided Court to the *Dred Scott* decision, the first link in a chain of events which eventually led to the Civil War.

Lincoln's choice for Chief Justice, Salmon Chase, struck down as unconstitutional the very legal tender acts he himself had written as the Secretary of the Treasury, acts that were to have been the centerpiece of the Republican Party's post-Civil War economic program.

In our century, Charles Evans Hughes led the Court through a constitutional crisis over Franklin Roosevelt's New Deal culminating in Congress' rejection of the Court-packing plan Roosevelt conceived to save his economic program.

Earl Warren's leadership in composing a unanimous Court behind the *Brown* decision was undoubtedly crucial in winning public acceptance for the desegregation of the public schools in the 1950's.

And most recently, Chief Justice Warren Burger wrote the opinion telling the President of the United States who had appointed him that no American, not even the President of the United States, could stand above the law that governs us all.

These decisions were not only landmarks in our law; they marked off major watersheds in American history, and it is impossible to deny the lasting impact these men have had and will continue to have upon our society.

And just as surely, no one can deny that the standards appropriate to the exercise of the Senate's constitutional responsibility in advising and consenting to the nomination of a Chief Justice not only differ from those we would apply to the nomination of judges of the lower Federal courts but differ significantly even from the standards that would be adequate for the nomination of an Associate Justice of the Court itself.

That duty is imposed upon us by article II, section 2, and it was not without constitutional afterthought.

Until the last days of the 1787 Constitutional Convention, the power of appointing Federal judges was to be lodged with the U.S. Senate alone. The President was to play no part in the process, and it was finally shared by the President only as part of a complex political compromise in the last 2 days of that convention.

Speeches at the convention and commentaries written shortly after the convention make it clear that the Senate's role was always intended to be an active and highly visible one.

In fact, just 6 years after the Constitution was ratified, the U.S. Senate rejected George Washington's nomination of John Rutledge, a former Associate Justice to be Chief Justice.

Since then, the Senate has rejected more nominees to the Supreme Court than Presidential nominees to any other Federal office.

And out of the 18 nominations for Chief Justice considered by the Senate, 4 nominees—Rutledge, George Williams, Caleb Cushing, and Abe Fortas—have failed to win confirmation.

Historically, the Senate's inquiry into each of these nominations has been factually rigorous examination of the nominee's life and work.

One such investigation linked Ulysses S. Grant's nominee for Chief Justice, Cabel Cushing, to Confederate President Jefferson Davis, and the Senate, therefore, refused to confirm Cushing.

Doubts about capability or character have, in the past, resulted in Senate rejection of Supreme Court nominees.

Although it is probably somewhat painful and a painful episode in the memory of some sitting members of this committee, Clement Haynsworth and Harold Carswell were rejected just for those reasons.

But historically, from the fight over the Rutledge nomination in 1795 which centered on his speeches against the Jay Treaty, through more contemporary struggles over the nominations of Louis Brandeis, John Parker, and Abe Fortas, the Senate has often considered a nominees judicial philosophy and vision of the Constitution.

And so we must because unlike other lower court judges, Supreme Court Justices have a significant hand in fashioning the ultimate shape of the law, and they just exercise greater flexibility of judgment in reaching the broader decisions demanded of the Nation's highest court.

The Senate's constitutional responsibility in advising and consenting to the nomination of a Chief Justice must be taken as an exercise of a rare and special duty.

The leading opponent of the 1930 nomination of Judge John Parker to be Associate Justice, Senator William Borah of Idaho, said of the Senate's role in the confirmation process, and I quote:

> (The Supreme Court passes) upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon these matters. We declare national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Court bench something of their views on these questions.

Senator Borah, a progressive who loathed the Court's conservative opinions, nevertheless, understood the importance of the Court's independence and integrity. Seven years later it was he who rallied the Senate in opposing Roosevelt's court-packing plan.

And his views also deserve our consideration here because they were quoted favorably by Justice Rehnquist in a speech that he made 11 years ago.

But we need not go back to the 1930's to see a Senate leader closely scrutinizing the views of a Supreme Court nominee. During the hearings on the last nominee for the Chief Judgeship who was not confirmed, Abe Fortas, our distinguished Judiciary Chairman, Mr. Thurmond said, and I quote:

> It is my contention that the Supreme Court has assumed such a powerful role as a policymaker that the Senate must necessarily be concerned with the views of perspective Justices or Chief Justices as it relates to broad issues confronting the American people and the role of the Court in dealing with these issues.

I believe we owe the country nothing less than we did at that time. These hearings should meet at least the same standard of thoroughness and hard scrutiny that Senator Thurmond expressed in those words 18 years ago.

Outside the marble halls of the Supreme Court, the Chief Justice plays an important symbolic role of leadership in this Nation. We must never forget that the Court's place in our system of constitutional government, resting neither on the purse nor the sword, depends solely upon public confidence in its dedication to the faithful application of the rule of law.

The Chief Justice must be an effective leader who can, at critical moments in our history, build a consensus among nine independent strong-willed men and women for at such moments in our Nation's history, the American people have needed to hear a clear, common voice emerging from the Court.

When the Court has succeeded in meeting that need, it has been the intellect and persuasive power of the Chief Justice that has fashioned these powerful messages from the Court to the country.

Furthermore, the Chief must be the one person more than any other who symbolizes the Supreme Court's duty under our Constitution to guarantee "equal justice under the law" for all Americans.

Under what circumstances, if any, the next Chief Justice will exercise this implicit and important power, is a question we must ask in these hearings, in my opinion. In approaching this awesome responsibility of advise and consent on the nomination of the head of the third branch of Government, the Chief Justice of the Supreme Court, we should have no preconditions about how the nominee meets these criteria.

We should listen with open minds to all of the witnesses we will hear in the days ahead, foremost among them, Chief Justice Rehnquist. And we should understand that we will conduct these hearings in a manner not only out of consideration for Justice Rehnquist; not only out of consideration to the President who nominated him; but even more, much more, out of consideration of the people of the United States and the future of this great Nation.

For, as the Framers of the Constitution intended, the burden is upon the nominee and his proponents to make the case for confirmation of Chief Justice. We will be obliged to take into account, and members of this committee will want to satisfy themselves about such issues as: the nominee's role as a Supreme Court clerk, in advising his Justice on equal education; his role in challenging minority voters at the polls in Arizona; and the state of his personal health.

Of even greater concern will be the nominee's views of the role of the Chief Justice; his explanation of how the Constitution is intended to end discrimination in our society, and if it is intended to do that; and his vision, generally, of the Constitution, and how it is to be applied to the issues that come before the Court.

But most of all, Mr. Chairman, I believe we will need to ask the nominee, and finally ask ourselves, how his views, in Senator Thurmond's words, quote: "Relate to the broad issues confronting the American people," end of quote. And what he believes to be, quote: "The role of the Court in dealing with these issues."

Mr. Justice Rehnquist, if you are confirmed as Chief Justice of the United States, of the Supreme Court, the significant impact you will have upon the lives of Americans is likely to last long after everyone on this panel is gone from public life.

This is a fact that we simply cannot step aside and pretend does not exist. In undertaking this solemn responsibility, we will look to the past for guidance, but in reaching our decision, I believe we must keep our eyes fixed firmly upon the future, which will lie so much in the hands of the person, such as you, if you are confirmed as Chief Justice; a person who will, in fact, be able to act upon and be required to act upon the major social and political issues that we cannot even envision at this moment.

It is to that future, and to the coming generations of Americans, that I am convinced, we owe our first and final allegiance. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

We are not going to limit, or attempt to limit any member of this committee on what he has to say. I would say, though, that you do not have to deliver long, scholarly lectures until you feel that you are called on to do it.

Now, I observed that the able and distinguished majority leader, Senator Robert Dole of Kansas is here, and our two Senators from Virginia, Senator Warner and Senator Trible, the State in which Chief Justice Rehnquist now resides. And if there is no objection on the part of the committee—I know they want to get back to their duties—I would like to call on Senator Dole, if he cares to make a few remarks at this time. Senator DeConcini, I imagine that since you are from his State, that you will want to make some remarks, too. If you will join them down there.

We will now hear from Senator Dole, and then we will call on the other gentlemen. Senator Dole, we would be glad to hear from you.

STATEMENT OF HON. ROBERT DOLE, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator DOLE. Mr. Chairman, let me just say, very briefly, that I am here really for two purposes: one, to express my own appreciation for these hearings and for the cooperation we have had from Members on each side in setting a date for the hearing. I think it has worked out very well.

Second, I want to add my endorsement to those many other endorsements recommending Justice Rehnquist be our Chief Justice.

Because of his illness, I wish to place in the record the statement on behalf of the nominee by our distinguished colleague, the senior Senator from Arizona, Senator Goldwater.

I would like for the statement of Senator Goldwater, who is a long-time personal friend of Justice Rehnquist to be included in the record at this point.

[Senator Goldwater's prepared statement follows:]

PREPARED STATEMENT OF SENATOR BARRY GOLDWATER

Mr. Chairman, 15 years ago I had the pleasure of introducing then Assistant Attorney General William Rehnquist as a nominee to succeed Associate Justice Harlan. Today I have the great privilege of endorsing unequivocally the nomination of Associate Justice Rehnquist to serve as Chief Justice of the Supreme Court.

Mr. Chairman, the original Magna Carta of 1215 declared the qualifications of a Judge as follows: "We will not make justices . . except from those who know the law of the land and are willing to keep it." (Chapter 45.) Half a millennium later, James Wilson, one of the original Associate Justices of the Supreme Court and a signer of both the Declaration of Independence and the Constitution, added to this concise standard his instruction that "every prudent and cautious judge will . . . remember, that his duty and his business is, not to make the law, but to interpret and apply it." (Lectures on Law, Part 2.)

To these criteria, might add the expectation that a nominee be a person of high integrity and be free of any serious conflict of interest.

Mr. Chairman, Justice Rehnquist meets these tests perfectly. He is a man of evident excellence and his outstanding qualities have always been recognized by his colleagues of the bar.

As a student, he graduated from Stanford University "with great distinction" and as a member of Phi Beta Kappa. After acquiring a masters in history from Harvard, he graduated first in his class at Stanford Law School, where he served as editor of the Law Review.

As a private practitioner in Arizona for 16 years, where I knew the nominee personally, he achieved the highest rating Martindale's Legal Directory can give an attorney. In 1971, he also received the American Bar Association's highest rating of professional competence, judicial temperament and integrity.

While serving on the Nation's Highest Court, Justice Rehnquist has written 235 opinions for the court and participated in more than 60,000 cases, including petitions for certiorari.

His outstanding record of service on the Bench, and his well reasoned analyses of the law, prove beyond any doubt his fitness for the Office of Chief Justice. To use Alexander Hamilton's words in the Federalist Number 78, the nominee unites in the character of a judge "the requisite integrity with the requisite knowledge of the law."

If it is true, as some commentators have written, that Justice Rehnquist's Judicial opinions display a concern for principles of federalism and for the intention of those who drafted and ratified the Constitution, I believe this fact further commends the nominee for service as Chief Justice.

Let us remember that the tradition of federalism was born in efforts to limit the overbearing authority of parliament over representative assemblies in Colonial America; and it has survived and remains today as a fundamental check on the concentration in the central government of power dangerous to the liberties of the people.

And, as to the second characteristic, I do not believe that any of us could fault a member of the Court for possessing an abiding fidelity to the Constitution.

Mr. Chairman, I urge that you and the committee report favorably the nomination of William Rehnquist.

Senator DOLE. Also, Mr. Chairman, if I could include my statement in the record. It simply indicates that for those of us who have personally known Justice Rehnquist over the years, we are impressed by his judicial experience, and know of the hundreds of cases he has been involved in and the over 200 majority opinions that he has written. We are here to suggest that the President has done well and to support his nomination.

The CHAIRMAN. Without objection, the prepared statement of the able majority leader will be placed in the record.

[The prepared statement follows:]

Prepared Statement of Senator Bob Dole

Mr. Chairman and members of the committee: It is with the greatest of pleasure that I am here to endorse and support the nomination of William H. Rehnquist to be Chief Justice of the United States.

As a former member of this committee I have more than a little appreciation for the staggering responsibility you have in receiving nominations for judicial appointments from the President and processing them expeditiously yet carefully. When I first became a member of the committee in 1979, it became my job, as the newest member, to participate in numerous confirmation hearings. This, of course, was at the beginning of the last two years of the Carter administration, in which more than 150 judges were confirmed.

This activity was the result of an omnibus judgeship bill in 1978 which created 153 new judgeships in addition to the usual 30 to 50 annual vacancies due to retirements, resignations or death. Although I never was involved in a Supreme Court nomination, there were all manner of other judicial appointments to consider. One of the nominees that the committee approved at that time, Patricia Wald, just became the new chief judge of the Circuit Court of Appeals for the District of Columbia.

I mention this past history, because it seems relevant today. It seems to me that again the committee faces a similar situation. There is a need to act expeditiously yet carefully. Chief Justice Burger has announced his intention to retire from active service on the court so as to be able to devote his full time and attention to the Bicentennial Commission. In little more than a month the court will begin its active preparations for the fall term. Although the court does not formally convene until the first week of October, much work must be done prior to that date so that the court can organize itself and prepare for the cases to be presented.

To enter this period without a full court would be to place that institution in grave danger of falling behind in its vital work. For example, almost a thousand petitions for certiorari have accumulated at the Court over the summer months. The Justices must vote on these petitions before the first week in October.

There are 24 cases to be reviewed thoroughly before the October argument session.

As a former chairman of the Courts subcommittee, I have some appreciation of the leadership role of the Chief Justice as the presiding officer of the Judicial Conference of the United States. This group, which consists of the chief judges of the several circuit courts of appeal and other judicial leaders, is the policy making body for the Federal court system. Its fall meeting is scheduled for late September. A lame duck Chief Justice would understandably be hesitant to exercise his or her authority to do anything with a lasting effect, yet decisions have to be made.

Mr. Chairman, I recall Justice O'Connor's initiation to the Court. It was made immensely more difficult by the fact that she was not confirmed until a few days before the Court's first conference. The members of the Court did not want to vote on petitions without her participation. She was then faced with hundreds of petitions aided only by memoranda prepared by other Justices' law clerks. It is simply not possible to be a fully participating member of the court under those circumstances. Judge Scalia, if confirmed substantially after the August recess, would be at a major disadvantage, as would the rest of the Court waiting to see what would happen.

This is not to suggest that the committee should short-circuit its deliberate process. However, I suggest that the committee should make haste—carefully.

Since the President announced his intention to nominate Justice Rehnquist to become Chief Justice and Antonin Scalia to be Associate Justice, millions of words have been written tracing in great detail the public and private lives of these two men. Of course, the committee itself has full hearing records since both have previously been subject to the confirmation process. In addition, both have produced volumes of writtern opinions. Justice Rehnquist has authorized more than 200 opinions in his decade and a half of the High Court.

Then, too, the committee has been made aware of the FBI background reports and the various financial and ethics in government disclosures that have been made.

As I read the record and as I review the public life of William Rehnquist, I am persuaded the President has made an excellent choice to succeed Warren Burger as Chief Justice. He has the experience, temperament, wisdom and ability to be one of the great jurists of this Nation. It is not my place to restate or add to that which is already before the committee. I simply want to endorse this nominee in the strongest possible terms.

Mr. Chairman, I also ask unanimous consent that the statement of the distinguished senior Senator from Arizona, Mr. Goldwater, be placed in the record at this point. Senator Goldwater is unable to be here today. I know that Barry has always felt very proud of Mr. Justice Rehnquist and helped him get his start in Arizona politics many years ago. If he could have possibly been here today, he would have been.

The CHAIRMAN. I now call on the other Senator from Arizona, Senator DeConcini.

STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman, and my distinguished colleages on the Judiciary Committee, let me assure you that this will suffice for my opening statement and it is not a long one, so you can applaud if you want to, or you can go to sleep, as the case may be.

I am honored to be here, to introduce to this committee, for those of you who may not know, the Honorable William Rehnquist. He is the President's nomination, as you know, to be Chief Justice, as a matter of fact, the 16th. Justice Rehnquist appeared before this committee, as the record shows, some 15 years ago. He was confirmed by the U.S. Senate as an Associate Justice.

For that reason, I would like only to briefly outline Justice Rehnquist's career as his credentials and achievements are already quite well known to anyone on this committee, but I feel it important, at this beginning point, that they be reiterated.

After growing up and attending high school in Milwaukee, WI, William Rehnquist enlisted in the U.S. Army and served in the Air Corps as a weather observer from 1943 to 1946. After an honorable discharge, he attended and graduated with distinction from Stanford University.

During college he was elected to membership in Phi Beta Kappa. He received a master's of arts degree in Political Science from Harvard University in 1950. Justice Rehnquist finished first in his class at Stanford Law School in 1952. After graduating from law school he served as a law clerk for Justice Robert H. Jackson on the Supreme Court of the United States until June 1953.

From 1953 until 1969, Justice Rehnquist worked at a variety of firms in Phoenix, AZ, in private practice. In 1969 he was confirmed by the Senate as Assistant Attorney General in charge of the Office of Legal Counsel at the Department of Justice.

In 1971, at the age of 47, Justice Rehnquist's appointment to the Supreme Court of the United States was confirmed by the U.S. Senate.

Justice Rehnquist has established a reputation in the last 15 years as an energetic, efficient, hard-working member of the Court.

He is widely acknowledged as a writer of exceptional ability. He is well organized, and with polished opinions, with forcefulness of logic and expression, long on collegiality, and organization, are a requirement, Justice Rehnquist has it. I believe an immense talent that he will bring to the Court will serve him well in the administration of the Federal court system.

I know he welcomes the opportunity to direct his talents and energy to the duties of the Chief Justice. Mr. Chairman, I am very pleased with the statement issued by the ranking member, our friend and colleague, Joe Biden, to address this hearing with an open mind, with a feeling that, certainly, there is a burden to prove qualifications, but, to look at it without a predisposed judgment as to this nominee.

Indeed, these are prerogatives that we all face, and a great responsibility, but I firmly believe that this man has proven, by his expert conduct on the Court as an Associate Justice, that he can fill the position that he has been nominated to. Thank you, Mr. Chairman.

Also, I wish to place a letter in the record.

[Letter follows:]

PHOENIX, AZ,
July 29, 1986.

DEAR DENNIS: Thank you for your nice letter.

I notice in this morning's paper they have the FBI investigating Bill Rehnquist's poll watching activities in the early 1960's, and several very unfair statements have been made by various individuals.

Could I ask you to read my letter to the Judiciary Committee.

As you know I am a Democrat but my politics has never influenced me as a newspaperman and for many years I covered politics for The Arizona Republic. Historically—from the late 30's when I started covering politics, until the 60's when party strength in Arizona became equalized—there were many rumors and accusations of improper voting in South Phoenix. These rumors included such things as voting dead people, voting people who had moved, wholesale registering and voting of illiterates, etc.

Starting in the 1950's, the Republicans started poll-watching and challenging in that area. It was particularly active when Dick Kleindienst was state chairman and I think that is when Bill was active in the party. I remember the GOP was very active with teams of poll watchers and as a result a good many irregularities were uncovered and corrected.

I do not agree with Bill on some things but I must say this, and add that he always was a fine gentleman and I don't think he would unnecessarily harrass any individual. At that time you had to be able to read the Constitution to qualify to vote and I am sure some who could not read probably felt intimidated if they had been registered.

Sincerely,

BEN AVERY.

The **CHAIRMAN**. Thank you very much, Senator DeConcini. The distinguished and able Senator from Virginia. Senator Warner.

STATEMENT OF HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **WARNER**. Thank you, Mr. Chairman, and members of the committee. I shall follow the lead of the majority leader and submit my statement for the record, but I would like to add that we, in Virginia, are privileged to have him as a resident. I was honored to have my friend, of many years, ask that I appear on his behalf today, and I think I can best summarize my view, and that I think of the majority of Virginians, by saying that his judicial philosophy is predicated on courage, and it has as its foundation the Constitution of the United States.

Thank you, Mr. Chairman.

The **CHAIRMAN**. Without objection, the statement by the distinguished Senator from Virginia will be placed in the record.

[The prepared statement follows:]

Prepared Statement of Senator John Warner

Mr. Chairman, I am both pleased and honored to introduce Associate Justice William Hubbs Rehnquist to the Judiciary Committee for the position of Chief Justice of the United States.

William H. Rehnquist was originally confirmed as an Associate Justice in 1971. During his tenure as an Associate Justice, he has displayed a brilliant intellect and is respected by his colleagues as one of the brightest judicial minds on the Court.

Since graduating first in his class from Stanford University Law School, he has consistently maintained the highest standards of professionalism, and since 1971, has proved to be a jurist eminently qualified for our highest court.

Justice Rehnquist's unique combination of qualifications does not stop with his legal acumen or his dedication to the Constitution. He is also known for his energetic approach to his duties, and his congenial spirit. A Chief Justice possessing such well balanced and admirable qualities will certainly make a strong, effective and respected leader.

President Reagan described Justice Rehnquist as "sensitive to the role of courts, attentive to rights specifically guaranteed in the Constitution, and a jurist of highest competence."

Justice Rehnquist's judicial philosophy begins with courage. He has faced the most difficult issues before the Court with determination, placing his confidence and trust in the Constitution, and never being afraid to defend even the most unpopular position.

It is my hope that the Senate will strongly endorse President Reagan's nominee for Chief Justice of the United States.

The **Chairman**. We will now hear from the able and distinguished junior Senator from Virginia. Senator Trible.

STATEMENT OF HON. PAUL TRIBLE, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **Trible**. Mr. Chairman, I thank you for this opportunity to join my distinguished colleagues on this historic occasion, and I am honored to be asked to join him in presenting to this committee, Justice Rehnquist.

Let me add very briefly to what has been said. Justice Rehnquist, in my judgment, is an extraordinarily qualified choice for Chief Justice. He is a man of formidable intellect who has consistently demonstrated analytical rigor and wide-ranging scholarship.

During his tenure on the Court, Justice Rehnquist has been an articulate and persuasive advocate of traditional constitutional interpretation of federalism, individual liberty, and respect for the law.

I enthusiastically support his confirmation and I urge this committee to act promptly, and positively, and I thank you.

The **Chairman**. So, I believe the record shows that the Chief Justice is endorsed by both Senators from Arizona, his original home State—Senator Goldwater and Senator DeConcini—and by both Senators from his resident State at present—from Virginia, Senator Warner and Senator Trible.

You gentlemen are now excused, if you wish to leave. We will now return to the committee members, and the first, now, will be Senator Mathias of Maryland.

Senator **Mathias**. Thank you, Mr. Chairman. One of the great strengths of the Supreme Court is, of course, its stability. History does not assess the record of the Court in 2-year, or 4-year, or 6-year terms, but it studies it as a generation, or, even as an era.

Today, for the first time in 17 years, we stand on the threshold of a new era in the history of the Supreme Court. The Judiciary Committee has before it today, the man whom the President has nominated. It is interesting to reflect: The man whom the President has nominated as the first Chief Justice for the Nation's third century. The man who, in all likelihood, will be the first Chief Justice of the 21st century. And so I want to first congratulate Justice Rehnquist. The President has nominated him for a post that has been filled by only 15 other Americans in the whole history of the Republic.

I think in all candor, I should add to my congratulations my hopes for good luck, because the scrutiny that this nomination receives will, and certainly should be very thorough, very exacting, and perhaps, at moments, painful.

Few nominees have come before the committee with views that are as well known as those of Justice Rehnquist. His philosophy is generally known because his views are a matter of public record. They are spread on pages of dozens of volumes of U.S. reports. It is the committee's duty to examine that record very carefully. But I would say, Mr. Chairman, to our colleagues on this committee, I think we ought to do it with some sensitivity to the principle of judicial independence.

Our review of the nominee's judicial opinions will be watched very carefully by other Federal judges. I think these men and women must remain confident that they will not be called upon to account, at some future date, to the political branches of government for decisions that they have rendered in court, even though they do hope for greater opportunities for service in the judicial branch.

Since the nominee already serves as an Associate Justice of the Supreme Court, I would think that we should focus a part of our review on the specific responsibilities of a Chief Justice, responsibilities as the head of the judicial branch of government, as well as his position as the first among equals on the Bench of the Supreme Court.

Now, as to the former, the nominee, of course, has very big shoes to fill. If confirmed, he will succeed a Chief Justice who has devoted an extraordinary degree of attention to his institutional responsibilities.

Chief Justice Burger has spoken very forcefully for the Federal Bench, and, to a great degree, for the legal profession as a whole. He has spoken on a wide range of topics of importance to the administration of justice, and I think we will be particularly interested in Justice Rehnquist's plans for building on this foundation. The committee, I believe, should also explore the difficulties that the nominee may confront as the leader of a court that shows some signs of being increasingly polarized.

His ability to nurture consensus on the most pressing constitutional issues before the Court may well be his most compelling task, and his success in this endeavor will determine whether the Court can effectively serve as the arbiter of constitutional controversies.

The American people have reposed no more significant trust in the Senate than the duty to pass upon the President's choices of the men and women who will serve on the U.S. courts.

In this instance, of course, the duty is even greater. The issue before us is whether this nominee has the qualities of vision and leadership that the Nation expects of its Chief Justice, and that will be particularly essential in the Chief Justice, whose duty it will be, to lead the judicial branch of government into the third century of the Republic. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. The distinguished Senator from Massachusetts. Mr. Kennedy.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman.

The confirmation of a Chief Justice of the United States is a more important responsibility for the Senate than our action on any other nomination to any other Federal office. And the vote we cast on the Rehnquist nomination may be the most significant vote any of us cast in this Congress. It may also be the most important civil rights vote that any of us ever cast.

The Framers of the Constitution envisioned a major role for the Senate in the appointment of judges, it is an historical nonsense to suggest that all the Senate has to do is check the nominee's IQ, make sure he has a law degree and no arrests and rubber stamp the President's choice.

The Virginia plan, the original blueprint for the Constitution gave the legislature sole authority for the appointments of members of the judiciary. James Madison favored the selection of judges by the Senate. The provision ultimately adopted in the Constitution was a compromise described by Gouverner Morris as giving the Senate the power to appoint judges nominated to them by the President.

The original intent is clear—the Senate has its own responsibility to scrutinize judicial nominees with special care, and the highest scrutiny of all should be given to the person nominated to be Chief Justice.

It is no accident that the Constitution speaks not of the Chief Justice of the Supreme Court, but the Chief Justice of the United States. As the language of the Constitution itself emphasizes, the Chief Justice is more than just the leader of the Court. He symbolizes the rule of law in our society; he speaks for the aspirations and beliefs of America as a Nation.

In this sense, the Chief Justice is the ultimate trustee of American liberty; when Congresses and Presidents go wrong under the Constitution, it is the responsibility of the Supreme Court to set them right. As first among equals among members of the Court, the Chief Justice is chiefly responsible for ensuring that the Court faithfully meets this awesome responsibility.

Presidents and Congresses come and go, but Chief Justices are for life. In the 200 years of our history, there have been only 15 Chief Justices. The best of them, the greatest of them, have been those who applied the fundamental values of the Constitution fairly and generously to the changing spirit of their times.

With his famous dictum, "We must never forget that it is a constitution we are expounding," John Marshall shaped the Court in the early years, and laid the groundwork for America to become a nation. Roger Taney failed the test and helped put the country on the path to Civil War.

Charles Evans Hughes helped guide the country safely through its severest domestic test of modern times, the upheaval of the Great Depression. Earl Warren understood the central role of the individual and helped guarantee that the civil rights revolution would pursue a peaceful path.

Two hundred years of history have made the Chief Justice more than the Chief Enforcer of the law, Chief Defender of the President, Chief Advocate for transient majorities in Congress, State legislatures, and city councils. Equal justice under law also counts for something, and so does the Bill of Rights.

Measured by these standards, Justice Rehnquist does not measure up. As a member of the Court, he has a virtually unblemished record of opposition to individual rights in cases involving minorities, women, children, and the poor. His views are so far outside the mainstream, even of the Burger Court, that in 54 cases decided on the merits, Justice Rehnquist could not attract a single other Justice to his extremist views. Again and again, on vital issues, such as racial desegregation, equal rights for women, separation of church and State, he stood alone in 8-to-1 decisions, with all the other Justices on the other side.

U.S. Law Week's review of the past five terms of the Supreme Court indicates that Justice Rehnquist voted against the individual 77 percent of the time in cases involving individual rights.

If unanimous decisions are excluded, where no plausible argument could be made against the individual, Justice Rehnquest voted against the individual's claim 90 percent of the time.

Another revealing statistic involves Justice Rehnquist's dissents from action on the Court rejecting review of lower courts' decisions. He has written or jointed opinions dissenting from the denial of certiorari in over 70 cases, most of which involved individual rights or issues of criminal law. With rare exceptions, the government had lost below, and Justice Rehnquist argued that the Supreme Court should hear the case.

Mainstream or too extreme? That is the question. By his own record of massive isolated dissent, Justice Rehnquist answers that question. He is too extreme on race, too extreme on women's rights, too extreme on freedom of speech, too extreme on separation of church and state, too extreme to be Chief Justice.

His appalling record on race is sufficient by itself to deny his confirmation. When he came to the Supreme Court, he had already offered a controversial memoranda in 1952 supporting school segregation; he had opposed public accommodation legislation in 1964; he had opposed remedies to end school segregation in 1967; he had led the so-called ballot security program in the sixties that was a euphemism for intimidation of black and hispanic voters. On many of these issues, it now appears that Mr. Rehnquist was less than candid with the committee at his confirmation hearing in 1971.

As a member of the Supreme Court, Justice Rehnquist has been quick to seize on the slightest pretext to justify the denial of claims for racial justice. His dissent in the *Bob Jones University* case supported tax credits for segregated schools. In *Batson* v. *Kentucky,* his dissent supported the rights of a prosecutor to prevent blacks and minorities from serving on a jury. In the *Keyes* case, his dissent supported the view that segregation in one part of a school district does not justify a presumption of segregation throughout the district.

America can be thankful that in the difficult and turbulent years since World War II, we have had a Supreme Court that has been right on race, right on equal rights for women, right on apportionment, and the separation of power, right on free speech, and right on separation of church and state.

Imagine what America would be like if Mr. Rehnquist had been the Chief Justice and his cramped and narrow view of the Constitution had prevailed in the critical years since World War II. The schools of America would still be segregated. Millions of citizens would be denied the right to vote under scandalous malapportionment laws. Women would be condemned to second class status as second class Americans. Courthouses would be closed to individual challenges against police brutality and executive abuse—closed even to the press. Government would embrace religion, and the walls of separation between church and state would be in ruins. State and local majorities would tell us what we can read, how to lead our private lives, whether to bear children, how to bring them up, what kind of people we may become.

In these ways and in so many others, a Court remade in the image of Justice Rehnquist would make the Constitution, whose bicentennial we celebrate next year, a lesser document in a lesser land.

It would no longer be the bold charter of freedom, equality and justice that has made America great, but a structure for government decree and bureaucratic efficiency, a structure so suffocating to liberty that the Nation's founders—the patriots who fought a revolution to secure their freedom—would not recognize the reactionary revolution we had wrought.

That is not a vision of America I can support, nor is it a vision that the vast majority of our people would support. Justice Rehnquist is outside the mainstream of American constitutional law and American values, and he does not deserve to be Chief Justice of the United States. To paraphrase John Marshall, we must never forget that it is a Chief Justice we are confirming.

The **CHAIRMAN**. The able and distinguished Senator from Nevada.

STATEMENT OF HON. PAUL LAXALT, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator **LAXALT**. I thank the Chairman.

I would like to join with the Chairman and the other members of the committee in welcoming Justice Rehnquist on the occasion of his confirmation proceeding.

When he joined the Court in 1971, Justice Rehnquist brought to the bench a brilliance of intellect, an independence of thought, and a soundness of judgment that superbly qualifies him, in my opinion, to be the next Chief Justice of the United States.

Any questions regarding his competence, his temperament, and judicial outlook have certainly been answered in his 15 years on the Court.

I believe that he is an excellent choice for the highest judicial position in our Nation.

The occasion of these hearings, as my colleagues have indicated, is an important one. The constitutional role of the Senate in the confirmation process is that of an independent assessor of judicial candidates. This is the time and the place for the important questions about the nominee to be asked and answered.

The hearings present the Senate and the American people with the best opportunity to assure ourselves of the fitness of this man for this appointment. The hearings should be thorough, and the hearings should be fair. I am personally confident that they will confirm my belief that the President chose the very best candidate to be Chief Justice.

Justice Rehnquist, I welcome you to these hearings, and I wish you well.

I thank the Chairman.

The CHAIRMAN. The able and distinguished Senator from Ohio, Senator Metzenbaum.

STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Thank you, Mr. Chairman.

I want to join my colleagues in welcoming Justice Rehnquist to this hearing, and opportunity to discuss some of the issues concerning the confirmation process with the Justice directly. I'm grateful to him for taking the time to meet with me for that purpose.

In exercising our advice and consent role, the Senate has three distinct obligations. We must evaluate the nominee's competence; we must assess his or her integrity; we must determine whether the nominee will be faithful to the law and the fundamental values upon which our constitutional system is based.

I am not concerned about whether Justice Rehnquist is a political conservative. Political philosophy should not be a determinant in our evaluation. My principal concern is whether confirming this nominee as Chief Justice could affect the basic constitutional protections that Americans have enjoyed: the right to a fair trial; protection from discrimination; the right to privacy; the right to practice religion free of government interference.

That is what this hearing is about—not one man, not a President's choice, but the day-to-day rights and privileges of every person in this country.

Frankly, there is cause for concern.

Some of the positions Justice Rehnquist has taken, both before and after he went on the bench, suggest that he holds views so extreme that they are outside the mainstream of American thought and jurisprudence. In examining the record, we find that Justice Rehnquist has been the sole dissenter 54 times, more than any other sitting Justice, and to the best of my knowledge, more than any other Justice in history.

Justice Rehnquist has interpreted the first amendment doctrine of separation of church and state to mean that a State can become actively involved promoting religion. He has interpreted the Equal Protection Clause to give only the most limited protection to women, aliens who are legal residents, and indigents. He has interpreted the 14th amendment ban on discrimination to mean that prosecutors can intentionally keep citizens off juries just because they are black.

We also find a clear pattern in these decisions. If the issue involves individual civil liberties, the individual is likely to lose. If the issue involves a criminal defendant's rights, the defendant's claim is likely to be denied. But if the issue is whether big government is going to get its way, the result is likely to be that it will.

I find this last point particularly ironic, since conservatives profess to be in favor of limiting government control over our lives.

Supporters of this nomination will say that we should not consider political philosophy. I agree. But constitutional extremism is different from a conservative or liberal political philosophy. Some would argue that there is room on the Court for extremists, whether on the right, or on the left.

But it is not necessary to resolve that dispute here. The question before us is whether this nominee, if he is an extremist, should be Chief Justice.

The Chief Justice assigns the writing of opinions to individual Justices. He presides at the opinion conferences. He is the Chairman of the Judicial Conference of the United States. He has overall responsibility for the administration of the judicial branch.

We must also consider the role of the Chief Justice in achieving consensus on the most wrenching and difficult legal issues that divide our Nation. Could a Chief Justice Rehnquist have brought about a unanimous court in the *Brown* v. *Board of Education* case?

Could he have achieved consensus in a case similar to the one which involved access to President Nixon's tapes? The Senate must take these questions into account.

As my colleagues have already pointed out, the record of the Constitutional Convention shows clearly that the Framers intended that the Senate play an important role in advising on and consenting to Supreme Court nominations. I cannot accept the view that the Senate must passively approve a nominee merely because he or she is honest and legally competent, particularly for the position of Chief Justice if the effect will be to revise fundamentally our constitutional principles.

There is no doubt that the President should have wide discretion to pick nominees. He won that right a year ago last November. But there was no electoral mandate to repeal basic constitutional values; there was no great cry throughout the land to cut back on the Bill of Rights.

Mr. Chairman, my concern about this nomination goes beyond particular legal interpretation. We must also consider the effect of this nomination on the Court itself. The Supreme Court is perhaps the most respected institution in our country. It is perceived to be above the fray, the place where competing legal views are weighed objectively and thoughtfully.

That perception may be somewhat idealistic, but the perception is probably as important as the reality.

We must avoid a Supreme Court which lurches toward the extreme, whether that extreme be on the right or on the left. We must avoid a Court which is too quick to toss aside long-established precedent. We must avoid a Court which appears to decide the most important legal issues of the day on the basis of personal ideology, rather than a fairminded reading of the law.

And finally, serious questions have been raised about whether Justice Rehnquist was involved in challenging or harassing voters during the 1960's, and whether he was straightforward in explaining these activities to the Senate in 1971.

For this reason, Senator Simon and I asked the FBI to conduct a thorough investigation. We also requested that appropriate witnesses, 12 in number, testify before the committee. We expect that they will appear.

We must resolve these factual issues fairly and completely.

Mr. Chairman, these concerns require that we give the most careful and thorough consideration to the evidence that will be presented regarding this nomination.

Our highest obligation is neither to a single nominee, nor to the President. It is to the Court itself, and more particularly to the American people. Thank you.

The CHAIRMAN. The able and distinguished Senator from Utah, Mr. Hatch.

Senator HATCH. Mr. Chairman, thank you so much. I ask unanimous consent that my full statement be placed in the record.

The CHAIRMAN. Without objection, that will be done.

[The prepared statement follows:]

STATEMENT OF SENATOR ORRIN G. HATCH

NOMINATION HEARING FOR WILLIAM H. REHNQUIST

JULY 29, 1986

THANK YOU, MR. CHAIRMAN. ON DECEMBER 10, 1971, MR. WILLIAM HUBBS REHNQUIST WAS CONFIRMED AS THE 100TH JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, THE MOST POWERFUL JUDICIAL BODY IN THE WORLD. THIS WAS A VERY SIGNIFICANT OCCASION.

IT WOULD BE DIFFICULT INDEED TO MENTION AN ASPECT OF AMERICAN LIFE THAT HAS NOT BEEN SHAPED BY THE NINE LEGAL SCULPTORS OF THE SUPREME COURT. JUST SINCE 1971, A PRESIDENT HAS RESIGNED, THE WORLD'S LARGEST TELECOMMUNICATIONS COMPANY HAS DISINTEGRATED, RULES FOR CRIMINAL TRIALS HAVE CHANGED, EVEN A TOWN'S ABILITY TO DISPLAY A CRECHE HAS BEEN ESTABLISHED -- ALL BECAUSE JUSTICE REHNQUIST AND EIGHT OTHER INDIVIDUALS HAVE FOUND ENDURING PRINCIPLES IN A WEATHERED PIECE OF PARCHMENT. IN FACT, WHEREVER THE LAWS OF THIS NATION AND ITS STATES REACH, WE CAN PERCEIVE THE HANDPRINTS OF THE HIGHEST COURT.

AS THE NATION'S THIRD CHIEF JUSTICE DECLARED IN MARBURY V. MADISON, "OURS IS A GOVERNMENT OF LAWS, AND NOT OF MEN." THIS IS THE GENIUS OF THE CONSTITUTION -- THAT AMERICANS DO

NOT OWE THEIR HIGHEST LEGAL ALLEGIANCE TO ANY PERSON, NO MATTER HOW TRUSTED AND TRUSTWORTHY, BUT TO THE CONCEPT OF LIBERTY EMBODIED IN LAW. CHIEF JUSTICE JOHN MARSHALL, IN THAT SAME PIVOTAL CASE, EMPHASIZED THE VITAL MISSION OF THE JUDICIARY WITHIN THIS INSPIRED CONSTITUTIONAL SCHEME WITH THE WORDS: "IT IS EMPHATICALLY THE PROVINCE AND DUTY OF THE JUDICIAL DEPARTMENT TO SAY WHAT THE LAW IS." IN OTHER WORDS, THE CONFIRMATION OF JUSTICE REHNQUIST WAS ONE OF THE MOST IMPORTANT GOVERNMENTAL ACTIONS OF THAT ERA. HE WAS APPOINTED A "KEEPER OF THE COVENANT," A PROTECTOR OF THE AGREEMENT BETWEEN THE GOVERNMENT AND THE GOVERNED.

JUSTICE REHNQUIST WAS REMARKABLY PREPARED AND QUALIFIED FOR THAT MISSION IN 1971. HE HAD RECEIVED A M.A. FROM HARVARD, SCORED A 99.6 OUT OF 100 ON THE LAW SCHOOL APTITUDE TEST, AND GRADUATED FIRST IN HIS 1952 LAW SCHOOL CLASS. A CLASSMATE, SANDRA DAY, NOW ASSOCIATE JUSTICE O'CONNOR, RECALLS THAT WILLIAM REHNQUIST WAS "HEAD AND SHOULDERS ABOVE ALL THE REST OF US IN TERMS OF SHEER TALENT AND ABILITY." MOREOVER HE WON A COVETED SUPREME COURT CLERKSHIP AND SERVED AS AN ASSISTANT ATTORNEY GENERAL BEFORE ASCENDING TO THE BENCH.

SINCE THAT TIME, JUSTICE REHNQUIST HAS PROVEN A MATCH FOR THE AWESOME TRUST PLACED IN HIM BY THE PRESIDENCY, THE SENATE, AND THE PEOPLE OF THE UNITED STATES. A 1985 NEW YORK TIMES ARTICLE STATES THAT "REHNQUIST STANDS OUT" FROM

AMONGST HIS COLLEAGUES ON THE COURT. ESTEEMED UNIVERSITY OF VIRGINIA LAW PROFESSOR, A. E. "DICK" HOWARD, COMMENTED WELL OVER A YEAR AGO THAT "/JUSTICE REHNQUIST/ HAS A CLAIM TO THE LEADERSHIP ROLE ON THE COURT." PROFESSOR HOWARD ALSO NOTED IN A RECENT ABA JOURNAL THAT "PERHAPS NO JUSTICE AT THE COURT GENERATES MORE GENUINE WARMTH AND REGARD MONG BOTH HIS COLLEAGUES AND OTHERS WHO WORK AT THE COURT." THIS ASSERTION IS CONFIRMED BY JUSTICE WILLIAM BRENNAN WHO, IN RESPONSE TO A PRESS INQUIRY, STATED THAT JUSTICE REHNQUIST WOULD MAKE A "SPLENDID CHIEF JUSTICE."

PRESIDENT REAGAN IS TO BE COMMENDED FOR RECOGNIZING THESE MARVELOUS QUALITIES IN JUSTICE REHNQUIST AND APPOINTING HIM TO BECOME THE 16TH CHIEF JUSTICE OF THE UNITED STATES. PERHAPS NO OTHER INDIVIDUAL TODAY WOULD GRACE MORE THE ERMINE WORN BY CHIEF JUSTICES JOHN MARSHALL, SALMON CHASE, WILLIAM H. TAFT, AND WARREN BURGER THAN JUSTICE WILLIAM H. REHNQUIST.

IF I MAY, MR. CHAIRMAN, I WOULD LIKE TO COMMENT JUST BRIEFLY ON THESE CONFIRMATION PROCEEDINGS. AS WE ALL KNOW, THE CONSTITUTION CONTAINS NO EXPLICIT STANDARD FOR NOMINATION PROCEEDINGS. ARTICLE III DEFINING THE ROLE OF THE JUDICIARY AND ARTICLE VI REQUIRING JUDGES TO TAKE AN OATH TO UPHOLD THE CONSTITUTION SUGGEST A STANDARD APPLICABLE TO THE PROPER ROLE OF THE COURT AND THE ABILITY OF CANDIDATES TO FULFILL THE OBLIGATIONS OF SERVING ON OUR

NATION'S HIGHEST TRIBUNAL. THESE PROVISIONS NOTE THAT A JUDGE'S DUTY IS TO DECIDE CASES AND CONTROVERSIES IN ACCORD WITH THE CONSTITUTION AND LAWS OF THE UNITED STATES. SINCE JUDGES ARE OBLIGATED TO FIND, AND NOT MAKE, THE LAW, THEIR PERSONAL VIEWS ON THE POLITICAL OR SOCIOLOGICAL MERITS OF AN ISSUE HAVE LITTLE RELEVANCE TO INQUIRIES ABOUT JUDICIAL QUALIFICATIONS.

MOREOVER SINCE JUDICIAL CANDIDATES, AND PARTICULARLY SITTING JUDGES, OWE THE NATION A DUTY TO AVOID PREJUDGING ISSUES, IT IS INAPPROPRIATE FOR THEM TO PRESUME TO GUESS IN THE ABSTRACT HOW THEY MIGHT DECIDE A SPECIFIC ISSUE IN ITS FACTUAL CONTEXT. IN SHORT, MR. CHAIRMAN, THE OFFICE HE NOW HOLDS AND THE OFFICE TO WHICH HE MAY ASCEND REQUIRE JUSTICE REHNQUIST TO REFRAIN FROM SPECIFIC ANSWERS TO SOME QUESTIONS. I MENTION THAT TO ASSURE MY COLLEAGUES AND OTHER WITNESSES THAT JUDICIAL DUTY, NOT ANY DESIRE TO EVADE, MAY PROMPT THE JUSTICE TO AVOID RESPONDING TO SOME INAPPROPRIATE INQUIRIES. FRANKLY, IF THIS COMMITTEE OR ANY CITIZEN WANTS TO KNOW HOW JUSTICE REHNQUIST DECIDES QUESTIONS, HIS LEGAL OPINIONS ARE AVAILABLE FOR ALL TO SEE IN 70-ODD VOLUMES OF THE UNITED STATES REPORTS.

ONE FURTHER POINT, MR. CHAIRMAN, WE ARE ALL AWARE THAT MANY QUESTIONS HAVE BEEN RAISED ABOUT THIS NOMINATION WHICH DATE BACK SEVERAL DECADES. NOT ONLY DO MANY OF THESE ALLEGED CONCERNS PREDATE JUSTICE REHNQUIST'S 1971

CONFIRMATION, MANY RELATE TO HIS CLERKSHIP IN 1952. JUST TO PUT THESE EVENTS IN THEIR PROPER PERSPECTIVE, I THINK IT IS IMPORTANT TO NOTE THAT AT THAT TIME THE HOOLA HOOP WAS STILL A DECADE FROM ITS HEYDAY. "BONANZA" AND THE "MOUSEKETEER CLUB" WOULD NOT APPEAR FOR MANY YEARS. IN FACT, TV WAS STILL A LUXURY FOR MOST AMERICAN HOMES. CARMAKERS WERE NOT DESIGNING MINI-VANS, BUT CONVERTIBLES WITH ENORMOUS TAILFINS. FINALLY AND MOST SHOCKING OF ALL, STROM THURMOND WAS STILL A MISGUIDED DEMOCRAT AND HAD NOT YET EMBARKED ON HIS SENATE CAREER. IMAGINE A SENATE WITHOUT STROM THURMOND AND YOU CAN IMAGINE THE RELEVANCE OF THESE ACCOUNTS.

I HOPE YOU WILL PARDON ME FOR LOWERING THE TENOR OF THIS ESTEEMED PROCEEDING FOR A MOMENT. I WOULD, HOWEVER, LIKE TO CONCLUDE ON A HIGHER NOTE. THE IMPORTANCE OF THIS PROCEEDING IS ILLUSTRATED BY THE OBSERVATION OF ALEXIS DE TOCQUEVILLE THAT "SCARCELY ANY POLITICAL QUESTION ARISES IN THE UNITED STATES THAT IS NOT RESOLVED, SOONER OR LATER, INTO A JUDICIAL QUESTION." I WOULD ONLY ADD THAT IN THIS ERA WHEN MANY SUPREME COURT PRONOUNCEMENTS ARE DEBATED IN CONGRESS THAT SCARCELY ANY LEGAL QUESTION ARISES THAT IS NOT SOON A POLITICAL QUESTION. THE LEGAL HISTORY OF THIS NATION, THE DAILY LIVES OF ITS CITIZENS, AND THE FUTURE AGENDA OF BOTH CONGRESS AND THE COURT MAY WELL BE SHAPED BY TODAY'S EVENTS.

THE SUPREME COURT WILL INEVITABLY BE ENSNARLED IN THE GREAT QUESTIONS OF OUR GENERATION. INDEED JUSTICE HOLMES NOTED THAT THE ONLY PEACE FOUND AT THE COURT IS THE UNEASY STILLNESS FOUND AT THE EYE OF A HURRICANE. I AM GRATEFUL THAT PRESIDENT REAGAN HAS CHOSEN AN INDIVIDUAL OF THE QUALITY OF JUSTICE REHNQUIST TO GUIDE THE COURT THROUGH COMING STORMS.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. I would like to make just a few comments before I finish.

I might say that I think Justice Rehnquist has a remarkable record, and a remarkable reputation, a tremendous wit, brain and ability to bring about consensus, and of course, so many other things that even his more liberal colleagues have agreed to.

He has proven a match for the awesome task placed on him by the President, and, I believe, the Senate and the people of the United States of America. In 1985, a New York Times article said that Rehnquist stands out among his colleagues on the Court.

Esteemed University of Virginia Law Prof. A.E. Dick Howard, one of the true constitutional experts in this country, commented well over 1 year ago that Justice Rehnquist has a claim to the leadership role on the Court. Professor Howard also noted in a recent ABA Journal that perhaps no Justice of the Court generates more genuine warmth and regard among his colleagues and others who work at the Court.

This assertion is confirmed by Justice William Brennan, who in response to a press inquiry stated that Justice Rehnquist would make a, quote, splendid Chief Justice, unquote.

I would say a particularly fine remark coming from someone with whom Justice Rehnquist has differed so much in the past.

If I may, Mr. Chairman, I'd like to comment just briefly on these confirmation proceedings. As we all know, the Constitution contains no explicit standard for nomination proceedings. Article III, defining the role of the Judiciary, and article IV, requiring judges to take an oath to uphold the Constitution, suggests a standard applicable to the proper role of the Court and the ability of candidates to fulfill the obligations of serving on our Nation's highest tribunal.

These provisions note that a judge's duty is to decide cases and controversies in accordance with the Constitution and laws of the United States. Since judges are obligated to find and not make law, their personal views on the political or sociological merits of an issue have little relevance to the inquiries about judicial qualifications.

In that regard, I have been interested in some of the comments by some of my colleagues regarding Mr. Justice Rehnquist's dissenting role. I might add that in his 14-year tenure he has dissented 54 times. Now, his voting record over the years has been matched in its consistency only by Justices Thurgood Marshall and William J. Brennan, Jr. I might add that Justice Rehnquist is not the greatest sole dissenter on the current Court. During the period in which they have overlapped, Justice Stevens has had 51 sole merit dissents for the last 10 years, and he has dissented alone far more times than Mr. Justice Rehnquist, who had 40 such dissents over the same period.

Justices Marshall and Brennan have been in dissent by themselves hundreds of times during their tenure. I think that stands them good; if they believe that strongly, they ought to stand up for their points of view, and what they believe the Constitution to be and the laws to be.

Historically, Justice Harlan's 56 sole dissents in the 7-year period between 1961 and 1967 can be compared with Mr. Justice Rehnquist's fewer dissents over a period twice as long.

I might add that Mr. Justice Rehnquist has been in the Court majority far more than several other Justices on the Court. So I find it a little bit surprising that these issues would even be raised in the way that they've been raised. Since 1980, for example, Justice Brennan has voted for the losing side almost twice as often as Mr. Justice Rehnquist. The moderate, Justice Stevens, has been the most frequent dissenter on the current court, as I have mentioned.

There are many other points that I think you could make on here, but let me just say that Mr. Justice Rehnquist has voted with the Court majority in the overwhelming bulk of the Court's cases, and especially in recent terms where he has been in dissent far fewer times than other Justices on the Court, and in particular, Justices Brennan and Marshall, who I have mentioned, and Stevens.

Now, I might add that indeed he has, over the last four terms, written more opinions on behalf of the full Court, that is, more opinions for the majority, than has any other Justice. And that's something that can't be ignored. And some of these assertions here today are somewhat ridiculous.

Just back to some of the reasons for these particular confirmation proceedings. Since judicial candidates, and particularly sitting justices or judges owe the Nation a duty to avoid prejudging issues, it is inappropriate for them to presume to guess in the abstract how they might decide a specific issue and its factual context.

In short, Mr. Chairman, the office he now holds, and the office to which he may ascend require Justice Rehnquist to refrain from some specific answers to some questions. I mention that to assure my colleagues and other witnesses that judicial duty, not any desire to evade, may prompt the Justice to avoid responding to some inappropriate inquiries.

Frankly, if this committee or any citizen wants to know how Justice Rehnquist decides questions, then his legal opinions are available to all of us to see in the 70-odd volumes of the U.S. Reports.

One further point, Mr. Chairman. We are all aware that questions have been raised about this nomination which date back several decades. Not only do many of these concerns predate Mr. Justice Rehnquist's 1971 confirmation, many relate to his clerkship in 1952.

Now, just to put these events in their proper perspective, I think it is important to note that at that time the hoola hoop was still a decade away from its heyday, Bonanza and the Mouscateer Club would not appear for many years. In fact, TV was still a luxury for most American homes. Car makers were not designing minivans but convertibles with enormous tailfins, and finally and most shocking of all, Senator Thurmond was still a misguided Democrat. [Laughter.]

And he had not yet embarked on his Senate career. Now, imagine the Senate without Strom Thurmond and you can imagine the relevance of these accounts.

I hope you pardon me for lowering the tenor of this esteemed proceeding for a moment, but I would, however, like to conclude on a higher note.

The importance of this proceeding is illustrated by the observation of Alexis De Tocqueville that, quote, "scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question."

I would only add that in this era when many Supreme Court announcements and pronouncements are debated in Congress that scarcely any legal question arises that is not soon a political question sometimes for us to resolve.

The legal history of this Nation, the daily lives of its citizens, the future agenda of both Congress and the Court may well be shaped by today's events.

The Supreme Court will inevitably be ensnarled in the great questions of our generation, and indeed, Justice Holmes, one of the all-time great justices, noted, and by the way a lone dissenter many, many times, noted that the only peace found at the Court is the uneasy stillness found at the eye of a hurricane.

I am grateful that President Reagan has chosen this individual, an individual of the quality of Mr. Justice Rehnquist, to guide the Court through the coming storms, and I think, Mr. Justice Rehnquist, you have the respect of most all of us, whether we agree or disagree with you. You have stood up and you have done what you believe is correct under the Constitution, and I believe that Senator Metzenbaum outlined those three points.

When it comes to competence, when it comes to integrity, when it comes to faithfulness to the law, I believe you have a plus in all three of those areas, and I believe the majority of the American people believe it, too.

I think it is time that we quit attacking everybody who comes before this committee and stop the character assassination that has been going on. It is fair to ask legitimate questions. It is fair to disagree on particular cases of law, but I think it's time to stop the politics and do what is right for the Supreme Court and this country. It is undignified to do otherwise.

Welcome to the committee. I hope it will be a better experience than it portends to be.

The **Chairman**. The able and distinguished Senator from Arizona, Mr. DeConcini.

Senator **DeConcini**. Mr. Chairman, I will just add my welcome to Justice Rehnquist here today and yield to the Senator from Vermont. I have already made a statement on behalf of the Justice.

The **Chairman**. The distinguished Senator from Vermont, Mr. Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator **Leahy**. Thank you, Mr. Chairman.

Mr. Chairman, I think it would probably be safe to say that were it not for these hearings, Justice Rehnquist and I would probably both be where in this time of the year we both would rather be and that is Vermont.

The Justice has a home there with all due respect to Dennis, used during the summer as compared to, I guess, Arizona in the wintertime.

The hearings we begin today, Mr. Chairman, are really among the most important that we as Senators are ever going to attend. At the close of these hearings, each Senator is going to have to decide whether or not he thinks it is in the best interest of this Nation to confirm Justice Rehnquist as the new Chief Justice.

I have respect for Justice Rehnquist and a personal liking for him. I will not make up my mind about whether to vote for his confirmation until the conclusion of these hearings. I think that is the reason for the hearings.

And it is also because I believe as Senators we have a solemn constitutional duty to give this nominee the very closest scrutiny on a wide range of qualifications and standards, and that duty arises directly from the Senate's unique responsibility to advise and consent in judicial nominations specified under article II in section 2 of the U.S. Constitution.

The intent of the Framers in adopting the appointments clause is clear from the records of the Constitutional Convention, and the Senate obligation is clear. We are not a rubber stamp for any President nor should we be nor does the Constitution ask us to be. In fact, it is quite the opposite.

We each have a duty to sift through the facts and decide whether a nominee is fit to sit on the bench. We should ask ourselves what some of the things are that we should look for in a nominee.

The Constitution places no restrictions on the factors that the Senate should take into accounting in confirming a judge, but I think our responsibility demands above all the standards we need to employ, the standard of excellence.

A nominee must be a person of high moral character, of integrity, who has demonstrated intellectual capacity and a fundamental understanding of the law. He or she must promise and convince all of us that he or she will uphold the Constitution of the United States.

A nominee has to be competent. He or she must bring to the Court experience, ability, keen awareness, judgment, sound legal skills, and ability to write legal judgments well. But perhaps most importantly a nominee must have the capacity to be fair and impartial.

There's been recent debate about whether or not a nominee's philosophy or ideology should be considered. Well, judicial candidates do not reside in a vacuum. They have judicial philosophies and policy views. A President does not nor should a President ignore these factors in the nomination process.

Our country has a long history of Presidents taking the views of nominee's into account, both liberal and conservative Presidents, both Democrats and Republicans. But the Senate also has an affirmative responsibility to consider a nominee's philosophy. Indeed, we'd be remiss if we did not scrutinize a nominee's views.

Our Constitution is a living document. That's part of its strength and its durability. In order for it to be responsive to new challenges of an ever-changing Nation, our Supreme Court justices must likewise be responsive.

If any Senator feels that a judicial nominee is so committed to a particular agenda that the nominee would not be fair and impartial, if he or she feels that the nominee would not protect fundamental rights of Americans, if he or she believes that the nominee would fail to respect the prevailing principles of constitutional law, that Senator not only has the right, that Senator really has a sworn duty to reject the nominee.

And during the consideration of Justice Rehnquist's nomination, each of us is going to have to evaluate the nominee. We will have special questions to answer pertinent to his nomination as Chief Justice. Can he carry out the administrative functions of that office? Can he exercise the requisite leadership?

We have, as Senators, a solemn responsibility that will affect this Nation, not only now, but way, way into the future, and will require our very best judgment, our most powerful scrutiny.

The Constitution demands no less nor would Justice Rehnquist expect any less from the U.S. Senate.

The CHAIRMAN. The able and distinguished assistant majority leader, Senator Alan Simpson of Wyoming.

STATEMENT OF HON. ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. Thank you, Mr. Chairman.

We're honored to welcome to the committee today, Bill Rehnquist and his fine wife and family. It is a pleasure to have you here.

It is a privilege for me to join with my colleagues in reviewing the career and the qualifications of the man nominated to be the 16th Chief Justice of the United States, a rather small number for a 210-year-old Nation. So we should be ever conscious of the importance of these proceedings and the long-term effect of this nomination upon the U.S. judicial system.

I think accordingly then that we must be very careful and alert to our duty to conduct these proceedings in a fair and balanced and civil fashion, seeking light and not heat, seeking information and not confrontation.

President Reagan was elected by a large majority. That has been discussed, he is one of our most popular Presidents. He has the right and the obligation to nominate qualified men and women who share the philosophy of this President.

There are also some troubling indications that I see publicly and privately—that events that occurred 20, 25, 35 years ago will be focused on here—possibly to the exclusion of this man's distinguished career on the bench since 1971.

I would hope we might receive the information which we are about to be presented as if it were fresh and timely and current and not yet displayed to the public. Then let us form our opinions about that information without the taint of what we called in the law business, "pretrial publicity." I have seen a lot of that manufactured around this burg these last few weeks.

Let us not neglect that extraordinary record which Justice Rehnquist has fashioned over his career, both before 1971 and after his appointment: The degrees at Harvard and Stanford where he graduated first in his class—that escaped me in my legal student days, I may add; a policy position with the Department of Justice, confirmation to the Supreme Court by a Judiciary Committee whose majority party was not sympathetic at all to the nominee's legal philosophy. I think we want to remember that rather carefully.

Then, once on the Court, a widespread reputation as a man of legal brilliance and judicial integrity and unmatched lucidity of reasoning.

But, after all of that, hang on tight because here we go again. You saw the security there at the door. That is where they check you out, and actually I think they check the Constitution out there at that door, too. That is where witnesses check it in.

You will have to ask Ed Meese and Brad Reynolds and Mr. Manion. You are ready for this, I know. You have been out to Wyoming, and this week they have frontier days. This process will be much like coming out of chute No. 4 on a bull at frontier days. You will be ready for that.

It is not as bad as the CSU-Wyoming football game which you went to last fall, but here you are still going to see things that are called loose facts, maybe no facts. You are going to see hearsay—which we do not even call hearsay evidence. We leave off evidence. We just call it hearsay. That is the worst kind.

You will see nastiness and hype and hoorah and maybe even a little of hysteria. This is that other branch. We are not bound by the strictures of the law. The niceties and the nuances of the law are not always found in these surroundings, sadly enough. That is why we try to remove judges from politics.

Those are things we try to do because it is better for them. Who would want to go through it? You are headed into a process where appetite and ambition compete openly with knowledge and wisdom, a very imprecise operation I can assure you.

I know you are ready for all that. I think of Rudyard Kipling and his remarkable poem "If," which is worth reading whether you are 27 or 57 or whenever. One of the lines is, "If you can bear to hear the truth you have spoken twisted by knaves to make a trap for fools." You will need that one.

You must be ready to hear and listen—with these lights in your face and people watching—to listen and hear that you are a racist, an extremist, which has already been suggested time and time again clearly, a trampler of the poor, a sexist, a single dissenter, whatever that is, an unwell man, a crazed young law clerk who is about two tacos short of a combination plate, and a violator of the sacred ballot when all you were doing is what every Democrat and Republican at this table has done. It is called ballot security and appearing at the polls. We have all done that as politicians, young politicians.

Here it all comes, a violator of the sacred ballot, an assassin of the first amendment. And yet 35 or 30 or 20 years ago was a very different time. A snapshot of another era. Civil rights in 1952: That was a very different time before *Brown*; before the 1964 Civil Rights Act that was passed in this Senate in a dramatic fashion.

And there is one for you. There are men in this present Senate on both sides of the aisle who voted against that. Are they less honorable because they were on the other side of the Civil Rights Act?

Why do we ask a higher standard of them or a higher standard of a 27-year-old law clerk? Interesting issue, but it will come.

Well, I would hate to go back and drag up all my old red wagons. I was always in trouble. When something happened in my hometown, the cop car drove up to our house. It was a ritual, an absolute ritual. My mother gasped, my father sighed.

The collected mumblings and memos of Al Simpson 35 years ago would be grotesque because change is the essence of life and creeping maturity is what we all had best be involved in. If I had not changed I would have been in the clink, and that is for sure. Check that record. It is a dazzler.

I am a birdwatcher here. I love this place. I love the Senate, but you are going to get a spirited exercise. I warn you of a bird of prey which is not in the Senate, and I describe it ornithologically. I have described it before; be on the lookout for them.

They are described best as a bug-eyed zealot, heavylided, characterized by ruffled feathers and a pinched bill. They scratch for and dig up dusty facts from old dirt, and then make a continual thin whining noise whenever the President pulls one of his appointees out of the bag.

You want to watch for them. They are endemic to the process and a little spooky to observe, and they are out here right now. I have seen some of them today perched on the edge of their roost waiting to gin up more stuff as soon as we get to them here today.

So, I say to you, sir, it is a pleasure and distinct privilege to have you here and I know you are ready for this. It is an exercise which is not pleasant, and I hope that we will remember that you are a sitting Supreme Court Justice of the United States of America, not somebody that wandered in to be approved to the Federal bench in some State, district, or circuit court. You ought to receive that due acknowledgement.

We should review your work product carefully, exceedingly carefully, but we should not delay these proceedings unduly in a search aimlessly to get this man, and I will be proud to be a part of a swift and well-deserved confirmation of you as the 16th Chief Justice of the United States.

The Nation will be well served by you, sir. You are a splendid gentleman. I have no further comment.

The **CHAIRMAN**. The able and distinguished Senator from Alabama, Judge Howell Heflin.

STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator **HEFLIN**. First, I would like to welcome you personally to this hearing as well as your wife and family. I am not here to condemn you or to praise you but to try to endeavor to do my duty fairly and justly. I approach these committee hearings with a sense of awe. It is a privilege to participate in the process of nominating an individual who will probably become only the 16th Chief Justice in American history.

There have been only 15 before him during the 210 years of this Nation's existence. I feel a deep and an abiding sense of responsibility because, while it is a privilege, it is also a power, one mandated by the Constitution to advise and consent on judicial nominations.

It is an awesome obligation to the Court and to the people. If it can truly be said that justice is our ultimate goal and that justice is indispensible for the survival of our free republic, then we can best assure and maintain it by exercising extreme diligence in selecting individuals who will care for our Constitution as its custodian.

The task that brings us here today is an important one. It is the process by which a branch of government renews itself, a process of regeneration, of pumping new blood into the life of a great and vital institution.

Hopefully, our system of justice will profit from a transfusion of energy and innovative ideas as well as from a new pacemaker. Some may question the analogy of new blood since Justice Rehnquist has served on the Court for the past 14 years.

But today, we are considering Justice Rehnquist for a different position, Chief Justice of the United States. While he will continue to serve on the Supreme Court, he will also, if he is confirmed, be assuming a new and extraordinarily important leadership responsibility to America's system of justice.

One might say that a more appropriate analogy of the confirmation of a Chief Justice would be the changing of the guard, the passing of the leadership role from one Chief Justice to another.

For the past 17 years Chief Justice Warren Burger has labored strenuously to improve and modernize our entire judicial system. His efforts have met with a tremendous degree of success.

If Justice Rehnquist is confirmed, I hope he will continue to improve the organization, the structure and the efficiency of State and Federal courts.

The independence of our judiciary is measured only by the strength of its parts. While it is manifestly important to thoroughly examine this nominee's qualifications and the role that he will assume as Chief Justice, it is also fitting and proper that we take note of the critical role that the Supreme Court plays in our system of segregated powers.

I have always believed that the establishment of the Supreme Court was the crowning marvel of the wonders wrought by the members of the Constitutional Convention almost 200 years ago.

The creation of the Supreme Court with its appellate powers was the greatest conception of the Constitution. No product of government either here or elsewhere has ever approached its grandeur.

It would be impossible for the members of this committee to take the task at hand too seriously. The Court itself, in the position for which Justice Rehnquist has been nominated, has no parallel in ancient or modern times; no other court has been vested with such high prerogatives.

Its jurisdiction extends over sovereign States as well as over the humblest individuals, but it should not encroach upon the reserved rights of the States or abridge the sacred privilege of local self government.

It is my hope that each member of the Supreme Court will never let individual freedom be the price of justice, but rather the result.

Justice Rehnquist, you were once asked in an interview what qualities should a Supreme Court justice possess. You responded in part with a quote from Cicero,

"He saw life clearly and he saw it whole."

It is my hope that you will consider the immense duty being proposed to be entrusted to you, that you will remember that you are no longer just a lawyer, no longer just a judge, no longer just an administrator. If confirmed you will become the Chief Justice of the United States.

While your major responsibility will be to the work of the Court, your leadership cannot help but impact upon the entire American system of justice. Look to your duty clearly as a whole.

There is much to be done. It is an awesome responsibility, an arduous task but an appropriate demand for the Chief Justice of our Supreme Court. There is no higher honor in the Judiciary, but while it is a position of strength, it is also one of humility.

In effect, you are a servant to many masters, the Supreme Court, the Federal courts, the State courts, and the American public. Serve them all well, all fairly, all equally, and your legacy will not only be compelling but complete. Good luck.

The CHAIRMAN. The able and distinguished Senator from Iowa, Mr. Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Mr. Chairman.

Today this committee begins one of its most solemn duties, and although the full Senate must ultimately act on this nomination, this committee has the obligation to build a record and to conduct the most in-depth inquiry that we can.

Fortunately, in the pursuit of that duty, we are aided in our inquiry by the fact that this nominee already has a well-documented record of Supreme Court jurisprudence. No doubt some would quarrel and some have already with that record and with that judicial philosophy.

I expect that we will hear witnesses who would take issue with the results or even with the legal reasoning of some of those individual cases, but that is not the point of our hearing.

Instead, we must assure ourselves that this nominee has the qualities deserving of the most important role on the most important court in our land, and for example, I would think that we ought to cover whether this nominee is a person of unquestioned integrity.

Will he render his opinions based on the Constitution and the relative statutes without regard to personal belief when those beliefs conflict with the law?

Is he a person of great intellectual capacity and knowledge of our Constitution? Will he exhibit an even judicial temperament, one that resists judicial activism and is not swayed by the mere breeze of public opinion?

Does he have a full appreciation of the separation of power principle and the careful balance between our coequal branches of the Federal Government?

Likewise, does he recognize that powers not expressly given to the Federal Government by the Constitution are reserved to the States and the people thereof rather than to the Supreme Court?

And particular to this role as Chief Justice, will he be a thoughtful and eloquent spokesperson on important issues of judicial administration and the role of the high court?

I look forward to our hearings as the best way to answer these questions. About a few items however there can be no doubt. It has been said both by those who agree and those who disagree with the nominee that Justice Rehnquist is a man of powerful intellect and very great independence of mind.

A fellow justice is said to have remarked that no member of the Court carries more constitutional law in his head than Justice Rehnquist. These qualities will, undoubtedly, stand him in good stead as Chief Justice.

With respect to his opinions, it seems to me that Justice Rehnquist has struck several consistent themes, prominent among these is federalism, a belief that Federal intervention into the affairs of a State requires convincing justification and that, in fact, it ought to be an exception rather than the rule.

Other themes include a commitment to the Framers original intent, a skepticism about judges setting out to solve social problems by themselves, a defference to legislative judgments and to the political process and a belief that judicial review ought to be restrained within clearly defined bounds.

All of these views will also, in my opinion, make him an effective Chief Justice, and so I look forward to these hearings, making those points that I think establish and certify what we already know about this gentleman.

The CHAIRMAN. The able and distinguished Senator from Illinois, Mr. Simon.

STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. Thank you, Mr. Chairman.

I want to join in welcoming Justice Rehnquist and his family. Several things have been talked about here. One is what is our role here, and I may be accused by Senator Simpson of being that bird to dig something out of the dust here now but I think as fine an article about what our role is that I have read was written by William H. Rehnquist in 1959 in the Harvard Law Record. I have an idea it is more carefully read today than it was in 1959, Mr. Justice.

But among other things he said the Senate should thoroughly inform itself on the judicial philosophy of the Supreme Court nominee before voting to confirming him. He talks about the debate when Herbert Hoover nominated Judge John Parker, who was rejected 41 to 39, but says that debate was the kind of debate and care that we should be providing.

He quotes Senator William Borah of Idaho saying:

> Upon some judicial tribunals it is enough perhaps that there be men of integrity and of great learning in the law. Upon this tribunal something more is needed, something more is called for, for here the widest, broadest, deepest questions of government and governmental politics are involved.

And then the future Justice writes:

> In the case of the Supreme Court, the something more which Borah spoke o comes into play. I would prefer to interpret this phrase not as meaning that it take more ability to be a Justice of the Supreme Court than a judge of the lower federal courts but rather that there are additional factors which come into play in the exercise of the function of a Supreme Court Justice.
>
> If greater judicial self-restraint is desired or a different interpretation of the phrases "due process of law" or "equal protection of the laws," then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is to inquire of men on their way to the Supreme Court something of their views on these questions.

It makes a pretty good, solid analysis. The questions that I am concerned about are these. First, what is the role of the Chief Justice and particularly Justice Rehnquist, what is your vision of that?

One of the things that hit me as I was reading, one of the things I just somehow thought picking the Chief Justice was in the Constitution that the President is supposed to do that. It is a statutory thing.

I am not at all sure when this is all over that we should not be looking at whether we really ought to be involved in this. The President should be involved or whether the Justices themselves in the future should not be selecting the Chief Justice.

I think it is basic as Senator Grassley has just said that the Chief Justice be a person of ability and integrity. I think the other questions I have that I would like to probe during the course of these hearings, one, is the nominee open-minded? Two, can he be a symbol of fairness to all people in this country, because the Chief Justice is not only an administrator but a symbol for the country?

Three, does he show a sensitivity in this whole area of civil liberties? Related to that is, four, basic respect for the Constitution, how we view church-state issues, first amendment issues, and other issues?

And on those areas I have questions and concerns. There is a fifth one that I think is also extremely important. Does he have the courage to be unpopular? Some of my colleagues view the numbers of dissents that Justice Rehnquist has made as a liability.

I think we ought to examine the content but frankly, I view it as an asset that someone shows the courage to stand up. As you view the history of the Court, occasionally the Court has not had the power, the courage to be unpopular.

One example in my lifetime, a tragic example is when Japanese Americans were taken from the West Coast and the U.S. Supreme Court bowed to public opinion rather than the Constitution.

But does the nominee have the courage to be unpopular? I think that is another important question. These are the things I am going to weigh as I consider how to vote.

Thank you, Mr. Chairman.

The CHAIRMAN. The able and distinguished Senator from Alabama, Mr. Denton.

STATEMENT OF HON. JEREMIAH DENTON, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator DENTON. Thank you, Mr. Chairman.

It is indeed a great honor and a pleasure to welcome Mr. Justice Rehnquist before this committee, and I offer you my personal congratulations, sir, on your nomination to serve as the 16th Chief Justice of the United States.

It is most appropriate at this time that we also take a moment to pay tribute to the retiring Chief Justice, Warren Burger. He has devoted 17 tireless years to the Supreme Court.

Throughout that time, he strived to make an overburdened judicial system more efficient and innovative and has unflinchingly spoken out against the misuse of the law to delay or deny justice.

In a recent television interview he eloquently spoke of the importance of the upcoming 200th anniversary celebration of the U.S. Constitution. Indeed, it will be a time to honor a document which has guided us so well and a time for Americans to pause and ponder the freedoms and liberties which we hold so dear.

Chief Justice Burger will make yet another indelible mark on America's history as he presides over that great celebration and we wish him the very best as he devotes his full time and energy to the bicentennial of America's Constitution.

Mr. Chairman, in my belief we have before us today a man whose distinction in jurisprudence has quickly established him as one of the great jurists of our time. He is recognized as a keen intellect on the Court and one who discharges his duties with alacrity and skill.

It is a tribute to our President to have chosen such a highly qualified man to serve as the first among equals for the U.S. Supreme Court.

I feel sure that his vitae have been reviewed. I will ask that my complete statement be included in the record, Mr. Chairman.

The CHAIRMAN. Without objection, so ordered.

[The prepared statement follows:]

PREPARED STATEMENT OF HON. JEREMIAH DENTON

Mr. Chairman: It is indeed a great honor and a pleasure to welcome Mr. Justice Rehnquist before this committee. I offer my personal congratulations to you, Justice Rehnquist, on your nomination to serve as the sixteenth Chief Justice of the United States.

It is most appropriate at this time that we also take a moment to pay tribute to retiring chief Justice Warren Burger. He has devoted seventeen tireless years to the Supreme Court. Throughout that time he has strived to make an overburdened judicial system more efficient and innovative, and has unflinchingly spoken out against the misuse of the law to delay or deny justice.

In a recent television interview, Chief Justice Burger eloquently spoke of the importance of the upcoming 200th anniversary celebration of the United States Constitution. Indeed it will be a time to honor a document which has guided us so well, and a time for Americans to pause and ponder the freedoms and liberties which we hold so dear. Chief Justice Burger will make yet another indelible mark on America's history as he presides over this great celebration, and we wish him the very best as he devotes his full time and energy to the bicentennial of America's Constitution.

Mr. Chairman, we have before us today a man whose distinction in jurisprudence has quickly established him as one of the great jurists of our time. Justice Rehnquist is recognized as a keen intellect on the Court, and one who discharges his duties with alacrity and skill. It is a tribute to our great President to have chosen such a highly qualified man to serve as the "first among equals" for the United States Supreme Court.

William Rehnquist was graduated first in his class from Stanford Law School in 1952, where he also served as Editor of the Law Review. One of his law school professors called William Rehnquist "the outstanding student of his law school generation."

In 1952 and 1953, William Rehnquist served as a law clerk to Associate Justice Robert H. Jackson. He then moved to Phoenix to pursue private law practice, only to return to Washington in 1969 to serve in the Justice Department's Office of Legal Counsel as Assistant Attorney General. He was nominated to his present position as Associate Justice on the United States Supreme Court by President Nixon in 1971.

Mr. Chairman, when William Rehnquist and Lewis Powell were before this Committee in 1971 as Supreme Court nominees, Senator John L. McClellan (D-Ark.) exhorted his colleagues to pursue the following line of thinking when considering the nominations.

"In considering these pending nominations," said Senator McClellan, "three issues face this committee, and will late face the Senate:

"Do these nominees have personal integrity?

"Do they possess professional competency?

"Do they have an abiding fidelity to the Constitution?

"After personal integrity and professional competency," continued Senator McClellan, "is the nominee's fidelity to the Constitution—its text, its intention and understanding by its framers, and its development through precedent over the history of our Nation."

In the last fifteen years as an Associate Justice on the Supreme Court, Justice Rehnquist has more than adhered to those criteria articulated by Senator McClellan. With regard to his personal integrity, Justice Rehnquist has lived up to his word delivered to this committee in 1971 during his nomination hearing. There he spoke of Justice Frankfurter's famous adage that, "if putting on the robe does not change a man, there is something wrong with the man." Justice Rehnquist went on to say: "When you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. You are there to construe as objectively as you possibly can the Constitution of the United States, the statutes of Congress, and whatever relevant legal materials there may be in the case before you." Mr. Chairman, I would assert that Justice Rehnquist has demonstrated his personal integrity by avoiding the temptation of unnecessarily expanding the law beyond precedent, adhering to a strict reading of the Constitution. In his fifteen years on the bench, Justice Rehnquist has remained faithful to his word.

In terms of professional competence, Justice Rehnquist has demonstrated that he is second to none. One need look no further than a Rehnquist opinion to find a profound, clear and tightly worded text. The Wall Street Journal recently said that: "His opinions are famous for going to the heart of issues. There is rarely any doubt among lower courts about what a Rehnquist opinion means."

Finally, Mr. Chairman, Justice Rehnquist has clearly shown that he has lived up to Senator McClellan's third and final criterion: fidelity to the Constitution and to precedent which has developed through the history of our nation. His fifteen year term on the Court, combined with recent constitutional history, provide a clear example of that fidelity to the Constitution and to precedent.

In the 1976 case of *National League of Cities* vs. *Usery*, the Court found that the 1974 amendments extending the Fair Labor Standards Act to state and local governments unconstitutionally infringed on state sovereignty protected by the tenth amendment. Justice Rehnquist clearly stated the Court's majority position, firmly adhering to the dictates of the tenth amendment. The opinion stated that, "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, but not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." Nine years later, the Court reversed itself on this particular issue in *Garcia* vs. *San Antonio Metropolitan Transit Authority* by overturning a lower court ruling precluding the Transit Authority from adhering to the overtime pay requirements of the Fair Labor Standards Act. Significantly, the majority placed little emphasis on the tenth amendment protection of state and local sovereignty on which Justice Rehnquist had based his earlier opinion in *National League of Cities*. Justice Rehnquist joined Justice O'Connor in a dissenting opinion which reflected the total consistency of his constitutional interpretation. The dissent stated that, "the States . . . have legitimate interests which the National Government is bound to respect even though its laws are supreme." In his own dissenting opinion, Justice Rehnquist spoke of the principle from the *National League of Cities* case which would, "in time again command the support of a majority of this Court."

Mr. Chairman, it is a special privilege and a keen honor to have before us today a man who wholly adheres to those qualities of personal integrity, professional competence, and fidelity to the Constitution. I urge my colleagues to give him their strongest support and approve his nomination as the sixteenth Chief Justice of the United States.

Thank you, Mr. Chairman.

Senator DENTON. Mr. Chairman, when William Rehnquist and Lewis Powell were before this committee in 1971 as Supreme Court nominees, Senator John L. McClellan, a Democrat from Arkansas as we know exhorted his colleagues to pursue the following line of thinking when considering the nominations:

"In considering these pending nominations," said Senator McClellan, "three issues face this committee and will later face the Senate. First, do these nominees have personal integrity? Second, do they possess professional competency? Third, do they have an abiding fidelity to the Constitution?"

Continuing the quotation, he said, "After personal integrity and professional competency, is the nominee's fidelity to the Constitution, its text, its intention and understanding by its Framers and its development through precedent over the history of our Nation."

In the last 15 years as an Associate Justice on the Supreme Court, Justice Rehnquist has more than adhered to those criteria articulated by Senator McClellan. With regard to his integrity, he has lived up to his word, delivered to committee in 1971 during his nomination hearing. There he spoke of Justice Frankfurter's famous adage that, "If putting on the robe does not change a man, there is something wrong with the man."

Justice Rehnquist went on to say, "When you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. You are there to construe as objectively as you possibly can the Constitution of the United States, the statutes of Congress and whatever relevant legal materials there may be in the case before you."

Mr. Chairman, I would assert that Justice Rehnquist has demonstrated his personal integrity by avoiding the temptation of unnecessarily expanding the law beyond precedent, adhering to a strict reading of the Constitution.

In his 15 years on the bench, Justice Rehnquist has remained faithful to his word. My personal respect for Justices was contained in a review of some quotations I had gathered over the years at the Naval Academy and in my youth in a book written by a man named Ed Brandt, and it had a quotation that said something like a naval officer should wear his blue as a justice's robes without a stain. I think Justice Rehnquist has demonstrated that kind of wearing.

In terms of professional competence, Justice Rehnquist has demonstrated that he is second to none. One need look no further than a Rehnquist opinion to find a profound, clear and tightly worded text.

The Wall Street Journal recently said that, "His opinions are famous for going to the heart of issues. There is rarely any doubt among lower courts about what a Rehnquist opinion means."

Finally, Mr. Chairman, Justice Rehnquist has clearly shown that he has lived up to Senator McClellan's third and final criterion, fidelity to the Constitution and to precedent which has developed through the history of our Nation.

His 15-year term on the Court combined with recent constitutional history provide a clear example of that fidelity to the Constitution and to precedent. In the 1976 case of *National League of Cities* v. *Usery,* the Court found that the 1974 amendments extending the Fair Labor Standards Act to State and local governments unconstitutionally infringed on State sovereignty protected by the 10th amendment.

Justice Rehnquist clearly stated the Court's majority position, firmly adhering to the dictates of the 10th amendment. The opinion stated that, "There are attributes of sovereignty attached to every State government which may not be impaired by Congress, but not because Congress may lack an affirmative grant of legislative authority to reach the matter but because the Constitution prohibits it from exercising the authority in that manner." Nine years later, the Court reversed itself on this principle in *Garcia* v. *San Antonio Metropolitan Transit Authority,* by overturning a lower court ruling precluding the transit authority from adhering to the overtime pay requirements of the Fair Labor Standards Act.

Significantly, the majority placed little emphasis on the 10th amendment protection of State and local sovereignty on which Justice Rehnquist had based his early opinion in *National League of Cities.* Justice Rehnquist joined Justice O'Connor, and that reminds me: I should have said the way a Justice wears his, or her robe without a stain—Justice Rehnquist joined Justice O'Connor in a dissenting opinion which reflected the total consistency of his constitutional interpretation.

The dissent stated that, "The States have legitimate interests which the national government is bound to respect, even though its laws are supreme."

In his own dissenting opinion, Justice Rehnquist spoke of the principle from the *National League of Cities* case, which would, "in time again command the support of a majority of this Court."

As I said, Mr. Chairman, it is a special privilege and a keen honor to have before us a man who wholly adheres to those qualities identified by Senator McClellan. I urge my colleagues to give him their strongest support and to approve his nomination as the 16th Chief Justice of the United States. I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. The able and distinguished Senator from Pennsylvania, Mr. Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman. Justice Rehnquist, I join in welcoming you and your family to these proceedings.

I have observed your career since 1969, when our first contact occurred, when you were an Assistant Attorney General and I was a district attorney. You have had a very distinguished career.

The Constitution gives this committee, and the Senate, a heavy responsibility in the advice and consent function, and that responsibility is heavier when it is a Supreme Court Justice, and especially the Chief Justice, because the Supreme Court must be the final arbiter of the Constitution.

Now, I intend to listen very carefully and to evaluate these proceedings very closely. I think that the Senators who have spoken before me have outlined the factors to be considered.

I think the time now has come to hear from the witnesses, and to see what proceeds in this hearing room. Thank you very much, Mr. Chairman.

The **Chairman**. Thank you very much. The able and distinguished Senator from Kentucky, Mr. McConnell.

STATEMENT OF HON. MITCH McCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator **McConnell**. Thank you, Mr. Chairman. Being in the same Judiciary Committee hearing room with Justice Rehnquist gives me a sense of déja vu. We have both been here before, going back to 1969, when I was an assistant to a Senator on this committee and you were Assistant Attorney General.

We were working on what some would argue were rather controversial Supreme Court nominations in those days, leading to an article that I published in a Kentucky law journal with which I believe Justice Rehnquist is familiar, in which I outlined my own views about what the appropriate criteria are for the Senate in advising and consenting to nominations for the Supreme Court.

Mr. Chairman, I would like to ask unanimous consent that that be included in the record at this point.

The **Chairman**. Without objection, so ordered.

[The document follows:]

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Haynsworth and Carswell: A New Senate Standard of Excellence

BY A. MITCHELL MCCONNELL, JR.*

> *All politicians have read history; but one might say that they read it only in order to learn from it how to repeat the same calamities all over again.*
>
> Paul Valery

With the confirmation of Judge Harry A. Blackmun by the United States Senate on May 12, 1970, the American public witnessed the end of an era, possibly the most interesting period in Supreme Court history. In many respects, it was not a proud time in the life of the Senate or, for that matter, in the life of the Presidency. Mistakes having a profound effect upon the American people were made by both institutions.

The Supreme Court of the United States is the most prestigious institution in our nation and possibly the world. For many years public opinion polls have revealed that the American people consider membership on the Court the most revered position in our society. This is surely an indication of the respect

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AUTHOR'S NOTE. This article represents the thoughts and efforts of over a year's involvement in the Senate with three Presidential nominations to the Supreme Court. The experiences were possible only because of the author's association with the Junior Senator from Kentucky, Marlow W. Cook, and the conclusions drawn and suggestions made, many of which may be found in a speech by the Senator of May 15, 1970, represent, in large part, a joint effort by the two of them to evolve a meaningful standard by which the Senate might judge future Supreme Court nominees.

Only rarely does a staff assistant to a Member of Congress receive the opportunity to express himself by publication or speech on an issue of public significance. For the freedom and encouragement to do so in this instance, the author is grateful to Senator Cook.

* Chief Legislative Assistant to Marlow W. Cook, United States Senator from Kentucky; B.A., *cum laude*, 1964, University of Louisville; J.D., 1967, University of Kentucky. While attending the College of Law he was President of the Student Bar Association, a member of the Moot Court Team, and winner of the McEwen Award as the Outstanding Oral Advocate in his class. He was admitted to the Kentucky Bar in September of 1967 at which time he became associated with the Louisville, Kentucky law firm of Segal, Isenberg, Sales and Stewart.

our people hold for the basic fabric of our stable society—the rule of law.

To the extent that it has eroded respect for this highest of our legal institutions, the recent controversial period has been unfortunate. There could not have been a worse time for an attack upon the men who administer justice in our country than in the past year, when tensions and frustrations about our foreign and domestic policies literally threatened to tear us apart. Respect for law and the administration of justice has, at various times in our history, been the only buffer between chaos and order. And this past year this pillar of our society has been buffeted once again by the winds of both justified and unconscionable attacks. It is time the President and the Congress helped to put an end to the turmoil.

The President's nomination of Judge Harry Blackmun and the Senate's responsible act of confirmation is a first step. But before moving on into what hopefully will be a more tranquil period for the High Court, it is useful to review the events of the past year for the lessons they hold. It may be argued that the writing of recent history is an exercise in futility and that only the passage of time will allow a dispassionate appraisal of an event or events of significance. This may well be true for the author who was not present and involved in the event. However, for the writer who is a participant the lapse of time serves only to cloud the memory. Circumstances placed a few individuals in the middle of the controversies of the past year. In the case of the author the experience with the Supreme Court nominees of the past year was the direct result of Senator Marlow W. Cook's election in 1968 and subsequent appointment to the powerful Senate Judiciary Committee. This committee appointment by the Senate Republican leadership, and Supreme Court nominations by President Nixon, brought about an initial introduction to the practical application of Article II, section 2 of the Constitution which reads, in part, that the President shall "nominate and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court."

The purpose of this article is to draw upon the events of the past year in suggesting some conclusions and making some recommendations about what the proper role of the Senate should be in advising and consenting to Presidential nominations to the Supreme Court. The motivations of the Executive will be touched upon only periferally.[1]

Initiated by Senator Robert P. Griffin, Republican of Michigan, the senatorial attack upon the Johnson nomination of Justice Abe Fortas to be Chief Justice which resulted in blocking the appointment had set a recent precedent for senatorial questioning in an area which had largely become a Presidential prerogative in the twentieth century. The most recent period of senatorial assertion had begun. But there had been other such periods and a brief examination of senatorial action on prior nominations is valuable because it helps put the controversial nominations of the past two years in proper perspective.

Joseph P. Harris, in his book, *The Advice and Consent of the Senate*, sums up the history of Supreme Court nominations by pointing out that approximately one-fifth of all appointments have been rejected by the Senate. From 1894 until the Senate's rejection of Judge Haynsworth, however, there was only one rejection. In the preceding 105 years, 20 of the 81 nominees had been rejected. Four of Tyler's nominees, three of Fillmore's, and three of Grant's were disapproved during a period of bitter partisarship over Supreme Court appointments. Harris concludes of this era:

> Appointments were influenced greatly by political consideration, and the action of the Senate was fully as political as that of the President. Few of the rejections of Supreme Court nominations in this period can be ascribed to any lack of qualifications on the part of the nominees; for the most part they were due to political differences between the President and a majority of the Senate.[2]

The first nominee to be rejected was former Associate Justice John Rutledge, of South Carolina. He had been nominated for the Chief Justiceship by President George Washington. The eminent Supreme Court historian Charles Warren reports that Rutledge was rejected essentially because of a speech he had made in Charleston in opposition to the Jay Treaty. Although his opponents in the predominantly Federalist Senate also started a rumor about his mental condition, a detached appraisal reveals his rejection was based entirely upon his opposition to the Treaty. Verifying this observation, Thomas Jefferson wrote of the incident:

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[1] For recent articles discussing the role of the Executive see Bickel, *The Making of Supreme Court Justices*, 53 THE NEW LEADER, May 25, 1970, at 14-18; Commager, *Choosing Supreme Court Judges*, 162 THE NEW REPUBLIC, May 2, 1970, at 13-16.

[2] J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 302-03 (1953).

> The rejection of Mr. Rutledge is a bold thing, for they cannot pretend any objection to him but his disapprobation of the treaty. It is, of course, a declaration that they will receive none but tories hereafter into any department of Government.[3]

On December 28, 1835, President Andrew Jackson sent to the Senate the name of Roger B. Taney, of Maryland, to succeed John Marshall as Chief Justice. As Taney had been Jackson's Secretary of the Treasury and Attorney General, the Whigs in the Senate strongly opposed him. Daniel Webster wrote of the nomination: "Judge Story thinks the Supreme Court is gone and I think so, too."[4] Warren reports that

> . . . the Bar throughout the North, being largely Whig, entirely ignored Taney's eminent legal qualifications, and his brilliant legal career, during which he had shared . . . the leadership of the Maryland Bar and had attained high rank at the Supreme Court Bar, both before and after his service as Attorney General of the United States.[5]

Taney was approved, after more than two months of spirited debate, by a vote of 29 to 15 over vehement opposition including Calhoun, Clay, Crittenden, and Webster. He had actually been rejected the year before but was re-submitted by a stubborn Jackson.[6]

History has judged Chief Justice Taney as among the most outstanding of American jurists, his tribulations prior to confirmation being completely overshadowed by an exceptional career. A contrite and tearful Clay related to Taney after viewing his work on the Court for many years:

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[3] 1 C. WARREN, THE SUPREME COURT IN U.S. HISTORY 134-35 (rev. ed. 1935).

[4] 2 C. WARREN, THE SUPREME COURT IN U.S. HISTORY 10 (rev. ed. 1935).

[5] *Id.* at 12.

[6] *Id.* at 13-15.

> Mr. Chief Justice, there was no man in the land who regretted your appointment to the place you now hold more than I did; there was no Member of the Senate who opposed it more than I did; but I have come to say to you, and I say it now in parting, perhaps for the last time—I have witnessed your judicial career, and it is due to myself and due to you that I should say what has been the result, that I am satisfied now that no man in the United States could have been selected more abundantly able to wear the ermine which Chief Justice Marshall honored.[7]

It is safe to conclude that purely partisan politics played the major role in Senate rejections of Supreme Court nominees during the nineteenth century. The cases of Rutledge and Taney have been related only for the purpose of highlighting a rather undistinguished aspect of the history of the Senate.

No implication should be drawn from the preceding that Supreme Court nominations in the twentieth century have been without controversy because certainly this has not been the case. However, until Haynsworth only one nominee had been rejected in this century. President Woodrow Wilson's nomination of Louis D. Brandeis and the events surrounding it certainly exhibit many of the difficulties experienced by Judges Haynsworth and Carswell as Brandeis failed to receive the support of substantial and respected segments of the legal community. William Howard Taft, Elihu Root, and three past presidents of the American Bar Association signed the following statement:

> The undersigned feel under the painful duty to say . . . that in their opinion, taking into view the reputation, character and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a Member of the Supreme Court of the U.S.[8]

Hearings were conducted by a Senate Judiciary subcommittee for a period of over four months, were twice-reopened, and the record of the hearings consisted of over 1500 pages.[9]

The nomination of Brandeis, like the nomination of Haynsworth, Carswell and to some extent Fortas (to be Chief Justice) quickly became a *cause célèbre* for the opposition party in the Senate. The political nature of Brandeis' opposition is indicated by the fact that the confirmation vote was 47 to 22; three Progressives and all but one Democrat voted for Brandeis and every Republican voted against him.[10]

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[7] *Id.* at 10.

[8] J. HARRIS, *supra* note 2, at 99.

[9] *Id.*

The basic opposition to Brandeis, like the basic opposition to Haynsworth and Carswell, was born of a belief that the nominee's views were not compatible with the prevailing views of the Supreme Court at that time. However, the publicly stated reasons for opposing Brandeis, just as the publicly stated reasons for opposing Carswell and Haynsworth, were that they fell below certain standards of "fitness."

Liberals in the Senate actively opposed the nominations to the Court of Harlan Fiske Stone in 1925 and Charles Evans Hughes five years later, for various reasons best summed up as opposition to what opponents predicted would be their conservatism. However, it was generally conceded by liberals subsequently that they had misread the leanings of both nominees, who tended to side with the Progressives on the Court throughout their tenures.[11]

No review of the historic reasons for opposition to Supreme Court nominees, even as cursory as this one has been, would be complete without mention of the Parker nomination. Judge John J. Parker of North Carolina, a member of the United States Court of Appeals for the Fourth Circuit, was designated for the Supreme Court by President Hoover in 1930. Harris reports that opposition to Parker was essentially threefold. He was alleged to be anti-labor, unsympathetic to Negroes, and his nomination was thought to be politically motivated.[12]

Opposition to Haynsworth and Carswell followed an almost identical pattern except that Judges Parker and Carswell were spared the charges of ethical impropriety to which Judge Haynsworth was subjected. All three nominees, it is worthy of note for the first time at this point, were from the Deep South.

As this altogether too brief historical review has demonstrated, the Senate has in its past, virtually without exception, based its objections to nominees for the Supreme Court on party or philosophical considerations. Most of the time, however, Senators sought to hide their political objections beneath a veil of charges about fitness, ethics and other professional qualifications. In recent years, Senators have accepted, with a few exceptions, the notion that the advice and consent responsibility of the Senate should mean an inquiry into qualifications and not politics or ideology. In the Brandeis case, for example, the majority chose to characterize their opposition as objecting to his fitness not his liberalism. So there was a recognition that purely political opposition should not be openly stated because it would not be accepted as a valid reason for opposing a nominee. The proper inquiry was judged to be the matter of fitness. In very recent times it has been the liberals in the Senate who have helped to codify this standard. During the Kennedy-Johnson years it was argued to conservatives in regard to appointments the liberals liked that the ideology of the nominee was of no concern to the Senate. Most agree that this is the proper standard, but it should be applied in a nonpartisan manner to conservative southern nominees as well as northern liberal ones. Even though the Senate has at various times made purely political decisions in its consideration of Supreme Court nominees, certainly it could not be successfully argued that this is an acceptable practice. After all, if political matters were relevant to senatorial consideration it might be suggested that a constitutional amendment be introduced giving to the Senate rather than the President the right to nominate Supreme Court Justices, as many argued during the Constitutional Convention.

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[10] *Id.* at 113.
[11] *Id.* at 115-27.
[12] *Id.* at 127-32.

A pattern emerges running from Rutledge and Taney through Brandeis and Parker up to and including Haynsworth and Carswell in which the Senate has employed deception to achieve its partisan goals. This deception has been to ostensibly object to a nominee's fitness while in fact the opposition is born of political expedience.

In summary, the inconsistent and sometimes unfair behavior of the Senate in the past and in the recent examples which follow do not lead one to be overly optimistic about its prospects for rendering equitable judgments about Supreme Court nominees in the future.

Clement F. Haynsworth, Jr.: Insensitive or Victimized?

For the great majority of mankind are satisfied with appearance, as though they were realities, and are often more influenced by the things that seem than by those that are.

(Author unknown)

The resignation of Justice Abe Fortas in May of 1969 following on the heels of the successful effort of the Senate the previous Fall in stalling his appointment to be Chief Justice, (the nomination was withdrawn after an attempt to invoke cloture on Senate debate was defeated) intensified the resolve of the Senate to reassert what it considered to be its rightful role in advising and consenting to presidential nominations to the Supreme Court.

It was in this atmosphere of senatorial questioning and public dismay over the implications of the Fortas resignation that President Nixon submitted to the Senate the name of Judge Clement F. Haynsworth, Jr., of South Carolina, to fill the Fortas vacancy. Completely aside from Judge Haynsworth's competence, which was never successfully challenged, he had a number of problems from a political point of view, given the Democrat-controlled Congress. Since he was from South Carolina his nomination was immediately considered to be an integral part of the so-called southern strategy which was receiving considerable press comment at that time. His South Carolina residence was construed as conclusive proof that he was a close friend of the widely-criticized senior Senator from that state, Strom Thurmond, whom, in fact, he hardly knew. Discerning Senators found offensive such an attack against the nominee rather than the nominator, since the southern strategy would be only in the latter's mind, if it existed. Nevertheless, this put the nomination in jeopardy from the outset.

In addition, labor and civil rights groups mobilized to oppose Judge Haynsworth on philosophical grounds. Some of the proponents of the Judge, including their acknowledged leader Senator Cook, might have had some difficulty on these grounds had they concluded that the philosophy of the nominee was relevant to the Senate's consideration. Senator Cook expressed the proper role of the Senate well in a letter to one of his constituents, a black student at the University of Louisville who was disgruntled over his support for the nominee. It read in pertinent part as follows:

> . . . First, as to the question of his [Haynsworth's] view on labor and civil rights matters, I find myself in essential disagreement with many of his civil rights decisions—not that they in any way indicate a pro-segregationist pattern, but that they do not form the progressive pattern I would hope for. However, as Senator Edward Kennedy pointed out to the conservatives as he spoke for the confirmation of Justice Thurgood Marshall,
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> 'I believe it is recognized by most Senators that we are not charged with the responsibility of approving a man to be Associate Justice of the Supreme Court only if his views always coincide with our own. We are not seeking a nominee for the Supreme Court who will express the majority view of the Senate on every given issue, or on a given issue of fundamental importance. We are interested really in knowing whether the nominee has the background, experience, qualifications, temperament and integrity to handle this most sensitive, important, responsible job.'
>
> Most Senators, especially of moderate and liberal persuasion, have agreed that while the appointment of Judge Haynsworth may have been unfortunate from a civil rights point of view, the ideology of the nominee is the responsibility of the President. The Senate's judgment should be made, therefore, solely upon grounds of qualifications. As I agree with Senator Kennedy and others that this is the only relevant inquiry, I have confined my judgment of this nominee's fitness to the issue of ethics of qualifications?[13]

The ethical questions which were raised about Judge Haynsworth were certainly relevant to the proper inquiry of the Senate into qualifications for appointment. Also distinction and competence had a proper bearing upon the matter of qualifications, but Judge Haynsworth's ability was, almost uniformly, conceded by his opponents and thus was never a real factor in the debate. A sloppy and hastily drafted document labelled the "Bill of Particulars" against Judge Haynsworth was issued on October 8, 1969, by Senator Birch Bayh of Indiana, who had become the

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[13] Letter from Senator Marlow W. Cook to Charles Hagan, October 21, 1969.

de facto leader of the anti-Haynsworth forces during the hearings on the nomination before the Judiciary Committee the previous month. This contained, in addition to several cases in which it had been alleged during the hearings that Judge Haynsworth should have refused to sit, several extraneous and a few inaccurate assertions which were swiftly rebutted two days later by Senator Cook in a statement aptly labelled the "Bill of Corrections." This preliminary sparring by the leaders of both sides raised all the issues in the case but only the relevant and significant allegations will be discussed here, those which had a real impact upon the Senate's decision.[14]

First, it was essential to determine what, if any, impropriety Judge Haynsworth had committed. For the Senator willing to make a judgment upon the facts this required looking to those facts. The controlling statute in situations where federal judges might potentially disqualify themselves is 28 U.S.C § 455 which reads:

> Any Justice or Judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, *in his opinion* for him to sit on the trial, appeal, or other proceeding therein. [Emphasis added.]

Also pertinent is Canon 29 of the American Bar Association Canons of Judicial Ethics which provides:

> A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved.

Formal Opinion 170 of the American Bar Association construing Canon 29 advises that a judge should not sit in a case in which he owns stock in a party litigant.

The first instance cited by Judge Haynsworth's opponents as an ethical violation was the much celebrated labor case, *Darling-*

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[14] For complete discussion of all issues raised by the "Bill of Particulars" see speech of Senator Marlow W. Cook, 115 Cong. Rec. S12314-20 (daily ed. Oct. 13, 1969). *See also* REPORT OF SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF CLEMENT F. HAYNSWORTH, JR., EXECUTIVE REPORT No. 91-12, 91st Cong., 1st Sess. (1969).

ton Manufacturing Co. v. NLRB,[15] argued before and decided by the Fourth Circuit in 1963. The Judge sat in this case contrary to what some of his Senate opponents felt to have been proper. The facts were that Judge Haynsworth had been one of the original incorporators, seven years before he was appointed to the bench, of a company named Carolina Vend-A-Matic which had a contract to supply vending machines to one of Deering-Millikin's (one of the litigants) plants. In 1957, when Judge Haynsworth went on the bench, he orally resigned as Vice President of the Company but continued to serve as a director until October, 1963, at which time he resigned his directorship in compliance with a ruling of the U.S. Judicial Conference. During 1963, the year the case was decided, Judge Haynsworth owned one-seventh of the stock of Carolina Vend-A-Matic.

Suffice it to say that all case law in point, on a situation in which a judge owns stock in a company which merely does business with one of the litigants before him, dictates that the sitting judge not disqualify himself. And certainly the Canons do not address themselves to such a situation. As John P. Frank, the acknowledged leading authority on the subject of judicial disqualification testified before the Judiciary Committee:

> It follows that under the standard federal rule Judge Haynsworth had no alternative whatsoever. He was bound by the principle of the cases. It is a Judge's duty to refuse to sit when he is disqualified, but it is equally his duty to sit when there is no valid reason not to . . . I do think it is perfectly clear under the authority that there was virtually no choice whatsoever for Judge Haynsworth except to participate in that case and do his job as well as he could.[16]

This testimony by Mr. Frank was never refuted as no one recognized as an authority on the subject was discovered who held a contrary opinion.

The second situation of significance which arose during the Haynsworth debate concerned the question of whether Judge

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[15] 325 F.2d 682 (4th Cir. 1963).

[16] *Hearings on Nomination of Clement F. Haynsworth, Jr. of South Carolina to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 115-16 (1969).

Haynsworth should have sat in three cases in which he owned stock in a parent corporation where one of the litigants before him was a wholly owned subsidiary of the parent corporation. These cases were *Farrow v. Grace Lines, Inc.*,[17] *Donohue v. Maryland Casualty Co.*,[18] and *Maryland Casualty Co. v. Baldwin*.[19]

Consistently ignored during the outrage expressed over his having sat in these cases were the pleas of many of the Senators supporting the nomination to look to the law to find the answer to the question of whether Judge Haynsworth should have disqualified himself in these situations. Instead, the opponents decided, completely independent of the controlling statutes and canons, that the Judge had a "substantial interest" in the outcome of the litigation and should, therefore, have disqualified himself. Under the statute, 28 U.S.C. § 455, Judge Haynsworth clearly had no duty to step aside. Two controlling cases in a situation where the judge actually owns stock in one of the litigants, not as here where the stock was owned in the parent corporation, are *Kinnear Weed Corp. v. Humble Oil and Refining Co.*[20] and *Lampert v. Hollis Music, Inc.*[21] These cases interpret "substantial interest" to mean "substantial interest" in the outcome of the case, not "substantial interest" in the litigant. And here Judge Haynsworth not only did not have a "substantial interest" in the outcome of the litigation, he did not even have a "substantial interest" in the litigant, his stock being a small portion of the shares outstanding in the parent corporation of one of the litigants. There was, therefore, clearly no duty to step aside under the statute. It is interesting to note that joining in the *Kinnear Weed* decision were Chief Judge Brown and Judge Wisdom of the Fifth Circuit whom Joseph Rauh, a major critic of the Haynsworth nomination, had stated at the hearings on the nomination "would have been heroic additions to the Supreme Court."[22]

But was there a duty to step aside in these parent-subsidiary cases under Canon 29? The answer is again unequivocally No.

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[17] 381 F.2d 380 (4th Cir. 1967).

[18] 363 F.2d 412 (4th Cir. 1966).

[19] 357 F.2d 228 (4th Cir. 1966).

[20] 403 F.2d 437 (5th Cir. 1968).

[21] 105 F. Supp. 3 (E.D.N.Y. 1952).

[22] *Hearings on Nomination of Clement F. Haynsworth, Jr.*, *supra* note 15, at 469.

The only case law available construing language similar to that of Canon 29 is found in the disqualification statute of a state. In *Central Pacific Railroad Co. v. Superior Court*,[23] the state court held that ownership of stock in a parent corporation did not require disqualification in litigation involving a subsidiary. Admittedly, this is only a state case, but significantly there is no federal case law suggesting any duty to step aside where a judge merely owns stock in the parent where the subsidiary is before the court. Presumably, this is because such a preposterous challenge has never occurred even to the most ingenious lawyer until the opponents of Judge Haynsworth created it. Therefore, Judge Haynsworth violated no existing standard of ethical behavior in the parent-subsidiary cases except that made up for the occasion by his opponents to stop his confirmation.

There was one other accusation of significance during the Haynsworth proceedings which should be discussed. It concerned the Judge's actions in the case of *Brunswick Corp. v. Long*.[24] The facts relevant to this consideration were as follows: on November 10, 1967, a panel of the Fourth Circuit, including Judge Haynsworth, heard oral argument in the case and immediately after argument voted to affirm the decision by the District Court. Judge Haynsworth, on the advice of his broker, purchased 1,000 shares of Brunswick on December 20, 1967. Judge Winter, to whom the writing of the opinion had been assigned on November 10, the day of the decision, circulated his opinion on December 27. Judge Haynsworth noted his concurrence on January 3, 1968, and the opinion was released on February 2. Judge Haynsworth testified that he completed his participation, in terms of the decision-making process, on November 10, 1967, approximately six weeks prior to the decision to buy stock in Brunswick. Judge Winter confirmed that the decision had been substantially completed on November 10.[25] Therefore, it could be strongly argued that Judge Haynsworth's participation in *Brunswick* terminated on November 10. However, even if it were conceded that he sat while he owned Brunswick stock it is important to remember that neither the statute nor the canons require an automatic disqualification, although Opinion 170 so advises. And the facts show that his holdings were so miniscule as to amount neither to a "substantial interest" in the outcome of the litigation under 28 U.S.C. § 455 or to a "substantial interest" in the litigant itself. Clearly, once again, Judge Haynsworth was guilty of no ethical impropriety.

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[23] 296 P. 883 (Cal. 1931).

[24] 392 F.2d 337 (4th Cir. 1968).

[25] *Hearings on Nomination of Clement F. Haynsworth, Jr., supra* note 15, at 238.

As mentioned earlier there were other less substantial charges by Haynsworth opponents but they were rarely used by opponents to justify opposition. These which have been mentioned were the main arguments used to deny confirmation. It is apparent to any objective student of this episode that Haynsworth violated no existing standard of ethical conduct, just those made up for the occasion by those who sought to defeat him for political gain. As his competence and ability were virtually unassailable, the opponents could not attack him for having a poor record of accomplishment or for being mediocre (an adjective soon to become famous in describing a subsequent nominee for the vacancy). The only alternative available was to first, create a new standard of conduct; second, apply this standard to the nominee retroactively making him appear to be ethically insensitive; third, convey the newly-created appearance of impropriety to the public by way of a politically hostile press (hostile due to an aversion to the so-called southern strategy of which Haynsworth was thought to be an integral part); and fourth, prolong the decision upon confirmation for a while until the politicians in the Senate reacted to an aroused public. Judge Haynsworth was defeated on November 21, 1969, by a vote of 55-45. Appearance had prevailed over reality. Only two Democrats outside the South (and one was a conservative—Bible of Nevada) supported the nomination, an indication of the partisan issue it had become, leading the *Washington Post*, a lukewarm Haynsworth supporter, to editorially comment, the morning after the vote:

> The rejection, despite the speeches and comments on Capitol Hill to the contrary, seems to have resulted more from ideological and plainly political considerations than from ethical ones. It is impossible to believe that all Northern liberals and all Southern conservatives have such dramatically different ethical standards.

CARSWELL: WAS HE QUALIFIED?

> *Even if he was mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Cardozos and Frankfurters and stuff like that there.*
>
> Senator Roman Hruska
> March 16, 1970

The United States Senate began the new year in no mood to reject another nomination of the President to the Supreme Court. It would take an incredibly poor nomination, students of the Senate concluded, to deny the President his choice in two successive instances. Circumstances, however, brought forth just such a nomination.

Subsequent to the defeat of Judge Haynsworth, President Nixon sent to the Senate in January of 1970 the name of Judge G. Harrold Carswell, of Florida and the Fifth Circuit. Judge Carswell had been nominated to the Circuit Court by President Nixon the year before, after serving 12 years on the U.S. District Court for the Northern District of Florida at Tallahassee to which he had been appointed by President Eisenhower.

He, too, faced an initial disadvantage in that he came from the south and was also considered by the press to be a part of the southern strategy. This should have been, as it should have been for Haynsworth, totally irrelevant to considerations of the man and his ability, but it was a factor and it immediately mobilized the not insignificant anti-south block in the Senate.

Many were troubled at the outset of the hearings about reports of a "white supremacy" speech Carswell had made as a youthful candidate for the legislature in Georgia in 1948, and later by allegations that he had supported efforts to convert a previously all-white public golf course to an all-white private country club in 1956, thus circumventing Supreme Court rulings.[29] There were other less substantial allegations including lack of candor before the Senate Judiciary Committee (which had also been raised against Judge Haynsworth) but all of these were soon supplanted by what became the real issue—that is, did Carswell possess the requisite distinction for elevation to the High Court.

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[29] *See Hearings on Nomination of George Harrold Carswell of Florida to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 91st Cong., 2nd Sess. (1970). *See also* REPORT OF SENATE JUDICIARY COMM. ON NOMINATION OF GEORGE HARROLD CARSWELL, EXECUTIVE REPORT No. 91-14, 91st Cong., 2nd Sess. (1970).

In attempting to determine by what standards Judge Carswell should be judged, some who had been very much involved in the Haynsworth debate attempted to define the standards which had been applied to the previous nominee. Kentucky's Marlow Cook called his standard the "Haynsworth test" and subsequently defined it as composed of essentially five elements, (1) competence; (2) achievement; (3) temperament; (4) judicial propriety and (5) non-judicial record.

Judge Haynsworth himself would not have passed this test had he in fact been guilty of some ethical impropriety—that is, if his judicial integrity had been compromised by violations of any existing standard of conduct. His record of achievement was only attacked by a few misinformed columnists and never really became an issue. And his competence, temperament and the record of his life off the bench was never questioned, but a breakdown in any of these areas might have been fatal also.

The judicial integrity component of the "Haynsworth test," previously described as a violation of existing standards of conduct for federal judges, was never in question in the Carswell proceedings. It was impossible for him to encounter difficulties similar to those of Judge Haynsworth because he owned no stocks and had not been involved in any business ventures through which a conflict might arise. Certainly, his non-judicial record was never questioned, nor was it a factor raised against any nominee in this century. Disqualifying non-judicial activities referred to here could best be illustrated by examples such as violations of federal or state law, or personal problems such as alcoholism or drug addiction—in other words, debilitating factors only indirectly related to effectiveness on the bench.

However, all the other criteria of the "Haynsworth test" were raised in the Carswell case and caused Senators seeking to make an objective appraisal of the nominee some difficulty. First, as to the question of competence, a Ripon Society Report and a study of the nominee's reversal percentages by a group of Columbia law students revealed that while a U.S. District Judge he had been reversed more than twice as often as the average federal district judge and that he ranked sixty-first in reversals among the 67 federal trial judges in the south. Numerous reversals alone might not have been a relevant factor; he could have been in the vanguard of his profession some argued. This defense, however, ignored simple facts about which even a first year law student would be aware. A federal district judge's duty in most instances is to follow the law as laid down by higher authority. Carswell appeared to have a chronic inability to do this. No comparable performance was ever imputed to Judge Haynsworth even by his severest critics.

Second, in the area of achievement, he was totally lacking. He had no publications, his opinions were rarely cited by other judges in their opinions, and no expertise in any area of the law was revealed. On the contrary, Judge Haynsworth's opinions were often cited, and he was a recognized expert in several fields including patents and trademarks, habeas corpus cases, and labor law. In addition, his opinions on Judicial administration were highly valued; he had been called upon to testify before Senator Tydings' subcommittee on Improvements in Judicial Machinery on this subject in June of 1969.

In addition to his lack of professional distinction, Judge Carswell's temperament was also questionable. There was unrebutted testimony before the Judiciary Committee that he was hostile to a certain class of litigants--namely, those involved in litigation to insure the right to vote to all citizens regardless of race pursuant to the Voting Rights Act of 1965. There had been testimony that Judge Haynsworth was anti-labor and anti-civil rights, but these charges alleged not personal antipathy but rather philosophical bias in a certain direction such as Justice Goldberg might have been expected to exhibit against management in labor cases. Such philosophical or ideological considerations, as pointed out earlier, are more properly a concern of the President and not the Senate, which should sit in judgment upon qualifications only.

And finally, a telling factor possibly revealing something about both competence and temperament was Judge Carswell's inability to secure the support of his fellow judges on the Fifth Circuit. By contrast, all Fifth Circuit judges had supported Judge

Homer Thornberry when he was nominated in the waning months of the Johnson presidency, even though that was not considered an outstanding appointment by many in the country. All judges of the Fourth Circuit had readily supported Judge Haynsworth's nomination. Therefore, it was highly unusual and significant that Judge Carswell could not secure the support of his fellow judges, especially when one considers that they must have assumed at that time that they would have to deal with him continually in future years should his nomination not be confirmed. His subsequent decision to leave the bench and run for political office in Florida seeking to convert a wave of sympathy over his frustrated appointment into the consolation prize of a United States Senate seat only tended to confirm the worst suspicions about his devotion to being a member of the Federal Judiciary.

Judge Carswell, then, fell short in three of the five essential criteria evolving out of the Haynsworth case. This compelled a no vote by the junior Senator from Kentucky and he was joined by several other Senators who simply could not, in good conscience, vote to confirm despite the wishes of most of their constituents. Of the southern Senators who had supported Haynsworth, Spong, of Virginia, and Fulbright, of Arkansas, switched. Gore, of Tennessee and Yarborough, of Texas, voted no again and the only Democrat outside the south of liberal credentials who had supported the Haynsworth nomination, Gravel, of Alaska, joined the opponents this time.

Judge Carswell was defeated 51-45 on April 8, 1970 by essentially the same coalition which had stopped Judge Haynsworth. The justification for opposition, however, as this article seeks to demonstrate, was much sounder. Some undoubtedly voted in favor of Carswell simply because he was a southern conservative. Others, no doubt, voted no for the same reason. The key Senators who determined his fate, however, clearly cast their votes against the Hruska maxim that mediocrity was entitled to a seat on the Supreme Court.

HARRY M. BLACKMUN: CONFIRMATION AT LAST

The political problem, therefore, is that so much must be explained in distinguishing between Haynsworth and Black-

> *mun, and when the explanations are made there is still room for the political argument that Haynsworth should have been confirmed in the first place.*
>
> Richard Wilson
> *Washington Evening Star*
> April 20, 1970

President Nixon next sent to the Senate to fill the vacancy of almost one year created by the Fortas resignation a childhood friend of Chief Justice Warren Burger, his first court appointment, Judge Harry A. Blackmun, of Minnesota and the Eighth Circuit. Judge Blackmun had an initial advantage which Judges Haysworth and Carswell had not enjoyed—he was not from the South. Once again, in judging the nominee it is appropriate to apply Senator Cook's "Haynsworth test."

Judge Blackmun's competence, temperament, and non-judicial record were quickly established by those charged with the responsibility of reviewing the nomination,[27] and were, in any event, never questioned, as no one asked the Judiciary Committee for the opportunity to be heard in opposition to the nomination.

In the area of achievement or distinction, Judge Blackmun was completely satisfactory. He had published three legal articles. "The Marital Deduction and Its Use in Minnesota;"[28] "The Physician and His Estate;"[29] and "Allowance of In Forma Pauperis in Section 2255 and Habeas Corpus Cases."[30] In addition, at the time of his selection he was chairman of the Advisory Committee on the Judge's Function of the American Bar Association Special Committee on Standards for the Administration of Criminal Justice. Moreover, he had achieved distinction in the areas of federal taxation and medico-legal problems and was considered by colleagues of the bench and bar to be an expert in these fields.

The only question raised about Judge Blackmun was in the area of judicial integrity or ethics. Judge Blackmun, since his appointment to the Eighth Circuit by President Eisenhower in 1959, had sat in three cases in which he actually owned stock in one of the litigants before him: *Hanson v. Ford Motor Co.*,[31] *Kotula v. Ford Motor Co.*,[32] and *Mahoney v. Northwestern Bell Telephone Co.*[33] In a fourth case, *Minnesota Mining and Manufacturing Co. v. Superior Insulating Co.*[34] Judge Blackmun acting similarly to Judge Haynsworth in *Brunswick*, bought shares of one of the litigants after the decision but before the denial of a petition for rehearings.

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[27] *See Hearings on Nomination of Harry A. Blackmun of Minnesota to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 91st Cong., 2nd Sess. (1970).

[28] Blackmun, *The Marital Deduction and Its Use in Minnesota*, 36 MINN. L. REV. 50 (1951).

[29] Blackmun, *The Physician and His Estate*, 36 MINN. MED. 1033 (1953).

[30] Blackmun, *Allowance of In Forma Pauperis in Section 2255 and Habeas Corpus Cases*, 43 F.R.D. 343 (1968).

As previously mentioned, Judge Haynsworth's participation in *Brunswick* was criticized as violating the spirit of Canon 29 and the literal meaning of Formal Opinion 170 of the ABA, thus showing an insensitivity to judicial ethics, but Judge Blackmun acted similarly in the 3M case and was not so criticized. Except as it could be argued in *Brunswick*, Judge Haynsworth never sat in a case in which he owned stock in one of the litigants but, rather, three cases in which he merely owned stock in the parent corporation of the litigant-subsidiary, a situation not unethical under any existing standard, or even by the wildest stretch of any legal imaginations, except those of the anti-Haynsworth leadership.

Judge Blackmun, on the other hand, committed a much more clear-cut violation of what could be labelled the "Bayh standard." Senator Bayh, the leader of the opposition in both the Haynsworth and Carswell cases, ignored this breach of his Haynsworth test with the following interesting justification:

> He [Blackmun] discussed his stock holdings with Judge Johnson, then Chief Judge of the Circuit, who advised him that *his holdings did not constitute a "substantial interest"* under 28 USC 455, and that he was obliged to sit in the case. There is no indication that Judge Haynsworth ever disclosed his financial interest to any colleague or to any party who might have felt there was an apparent conflict, before sitting in such case.[35] [Emphasis added.]

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[31] 278 F.2d 586 (8th Cir. 1960).

[32] 339 F.2d 732 (8th Cir. 1964).

[33] 377 F.2d 519 (8th Cir. 1967).

[34] 281 F.2d 478 (8th Cir. 1960).

[35] REPORT OF SENATE JUDICIARY COMM. ON NOMINATION OF HARRY A. BLACKMUN, EXECUTIVE REPORT No. 91-18, 91st Cong., 2nd Sess. 9 (1970).

Judge Haynsworth did not inform the lawyers because under existing Fourth Circuit practice he found no significant interest and, thus, no duty to disclose to the lawyers. In any event, Judge Blackmun did not inform any of the lawyers in any of the cases in which he sat, either. Judge Blackmun asked the chief judge his advice and relied upon it. Judge Haynsworth was the chief judge.

Chief Judge Johnson and Chief Judge Haynsworth both interpreted that standard, as it existed, not as the Senator from Indiana later fashioned it. That interpretation was, as the supporters of Judge Haynsworth said it was, and in accord with Chief Judge Johnson who described the meaning of 28 U.S.C. § 455 to be "that a judge should sit regardless of interest, so long as the decision will not have a significant effect upon the value of the judge's interest."[36]

In other words, it is not interest in the litigant but interest in the outcome of the litigation which requires stepping aside. But even if it were interest in the litigant, the interests of Blackmun were *de minimis* and the interests of Haynsworth were not only *de minimis*, but were one step removed—that is, his interest was in the parent corporation where the subsidiary was the litigant. Furthermore, the case law, what little there is, and prevailing practice dictate that in the parent-subsidiary situation there is no duty to step aside.

As John Frank pointed out to the Judiciary Committee during the Haynsworth hearings, where there is no duty to step aside, there is a duty to sit. Judge Haynsworth and Judge Blackmun sat in these cases because under existing standards, not the convenient *ad hoc* standard of the Haynsworth opponents, they both had a duty to sit. But it is worth noting that if one were to require a strict adherence to the most rigid standard—Formal Opinion 170, which states that a judge shall not sit in a case in which he owns stock in a party litigant—Judge Haynsworth whom Senator Bayh opposed had only one arguable violation, *Brunswick*, while Judge Blackmun whom Senator Bayh supported had one arguable violation, *3M*, and three clear violations, *Hanson*, *Kotula* and *Mahoney*.

The Senator from Indiana also argued that since Judge Blackmun stepped aside in *Bridgeman v. Gateway Ford Truck Sales,*[37] arising after the Haynsworth affair, a situation in which he owned stock in the parent Ford which totally owned one of the subsidiary-litigants, he "displayed a laudable recognition of the changing nature of the standards of judicial conduct."[38] Of course, Judge Blackmun stepped aside after seeing what Judge Haynsworth had been subjected to. Haynsworth did not have an opportunity to step aside in such situations since this new Bayh rule was established during the course of his demise. Certainly Judge Haynsworth would now comply with the Bayh test to avoid further attacks upon his judicial integrity just as Judge Blackmun wisely did in *Bridgeman.*

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[36] *Id.*

It is clear, then, to any objective reviewer, that the Haynsworth and Blackmun cases, aside from the political considerations involved, were virtually indistinguishable. If anything, Judge Blackmun had much more flagrantly violated that standard used to defeat Judge Haynsworth than had Judge Haynsworth. However, Judge Blackmun violated no existing standard worthy of denying him confirmation and he was quite properly confirmed by the Senate on May 12, 1970 by a vote of 88 to 0.

A New Test Can One Be Codified?

> *Bad laws, if they exist, should be repealed as soon as possible, still, while they continue in force, for the sake of example they should be religiously observed.*
>
> Abraham Lincoln

It has been demonstrated that Judges Haynsworth and Blackmun violated no existing standards worthy of denying either of them confirmation. Judge Carswell's defeat, like Judge Haynsworth's, was also due in part to the application of a new standard —it having been argued that mediocre nominees had been confirmed in the past, *a fortiori Carswell* should be also. Yet, certainly achievement was always a legitimate part of the Senate's consideration of a nominee for confirmation just as ethics had always been. The Senate simply ignored mediocrity at various times in the past and refused to do so in the case of Carswell. And in the case of Haynsworth it made up an unrealistic standard of judicial propriety to serve its political purposes and then ignored those standards later in regard to Judge Blackmun because politics dictated confirmation.

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[37] No. 19, 749, (February 4, 1970).

[38] REPORT OF SENATE JUDICIARY COMM. ON NOMINATION OF HARRY A. BLACKMUN, *supra* note 34, at 10.

Possibly, new standards should be adopted by the Senate but, of course, adopted prospectively in the absence of a pending nomination and not in the course of confirmation proceedings. In this regard, Senator Bayh has now introduced two bills, The Judicial Disqualification Act of 1970 and the Omnibus Disclosure Act which, if enacted, would codify the standards he previously employed to defeat Judge Haynsworth. This legislative effort is an admission that the previously applied standards were nonexistent at the time. Those bills are, however, worthy of serious consideration in a continuing effort to improve judicial standards of conduct. Some standards have been suggested here and will be recounted again but first some observations about the body which must apply them.

First, it is safe to say that anti-southern prejudice is still very much alive in the land and particularly in the Senate. Although this alone did not cause the defeats of Haynsworth and Carswell, it was a major factor. The fact that so many Senators were willing to create a new ethical standard for Judge Haynsworth in November, 1969, in order to insure his defeat and then ignore even more flagrant violations of this newly established standard in May of 1970, can only be considered to demonstrate sectional prejudice.

Another ominous aspect of the past year's events has been that we have seen yet another example of the power of the press over the minds of the people. As Wendell Phillips once commented, "We live under a government of men and morning newspapers." Certainly, one should not accuse the working press of distorting the news. The reporters were simply conveying to the nation the accusations of the Senator from Indiana and others in the opposition camp. These accusations were interpreted by a misinformed public outside the south (as indicated by prominent public opinion polls) as conclusive proof of Judge Haynsworth's impropriety and Judge Carswell's racism, neither of which was ever substantiated. The press should remain unfettered, but public figures must continue to have the courage to stand up to those who would use it for their own narrow political advantage to destroy men's reputations, and more importantly, the aura of dignity which should properly surround the Supreme Court.

Some good, however, has come from this period. Senatorial assertion against an all-powerful Executive, whoever he may be, whether it is in foreign affairs or in Supreme Court appointments, is healthy for the country. Such assertions help restore the constitutional checks and balances between our branches of government, thereby helping to preserve our institutions and maximize our freedom.

In addition, the American Bar Association has indicated a willingness to review its ethical standards and has appointed a Special Committee on Standards of Judicial Conduct, under the chairmanship of Judge Traynor, which issued a Preliminary Statement and Interim Report which would update the ABA Canons of Judicial Ethics. This report was discussed in public hearings on August 8th and 10th, 1970 at the Annual Meeting of the ABA in St. Louis and may be placed on the agenda for consideration at the February, 1971, mid-year meeting of the House of Delegates. Both supporters and opponents of Judge Haynsworth agreed that a review and overhaul of the ABA's Canons of Judicial Ethics was needed. This should be valuable and useful to the Senate as the Judiciary Committee under Senator Eastland has made a practice of requesting reports on Presidential nominees to the Supreme Court by the Standing Committee on the Federal Judiciary of the ABA. This practice probably should be continued as the Senate has not, in any way, delegated its decision upon confirmation to this outside organization. Rather, it seeks the views of the ABA before reporting nominees to the Judiciary to the floor of the Senate just as any committee would seek the views of relevant outside groups before proposing legislation.

Although not central to the considerations of this article, it should be noted what the Executive may have learned from this period. President Johnson undoubtedly discovered in the Fortas and Thornberry nominations that the Senate could be very reluctant at times to approve nominees who might be classified as personal friends or "cronies" of the Executive. It was also established that the Senate would frown upon Justices of the Supreme Court acting as advisors to the President as a violation of the concept of separation of powers. This argument was used very effectively against the elevation of Justice Fortas to the Chief Justiceship as he had been an advisor to President Johnson on a myriad of matters during his tenure on the Court. President Nixon learned during the Carswell proceedings that a high degree of competence would likely be required by the Senate before it approved future nominees. He also learned during the Haynsworth case that the Senate would likely require strict adherence to standards of judicial propriety.

Unfortunately, as a result of this episode, the Administration has adopted a very questionable practice in regard to future nominations to the Supreme Court. Attorney General John N. Mitchell announced on July 28, 1970 that the Justice Department would adopt a new procedure under which the Attorney General will seek a complete investigation by the ABA's Standing Committee on the Federal Judiciary before recommending anyone to the President for nomination to the Supreme Court. This Committee has already enjoyed virtually unprecedented influence in the selection of U.S. District and Circuit Judges as this Administration has made no nominations to these Courts which have not received the prior approval of this twelve man Committee. In effect, the Administration, after delegating to this Committee veto power over lower federal court appointments, has now broadened this authority to cover its selections to the Supreme Court. Complete delegation of authority to an outside organization of so awesome a responsibility as designating men to our federal District and Circuit Courts is bad enough, but such a delegation of authority to approve, on the Supreme Court level, is most unwise. Far from representing all lawyers in the country, the ABA has historically been the repository of "big-firm," "defense-oriented," "corporate-type lawyers" who may or may not make an objective appraisal of a prospective nominee. if President Wilson had asked the ABA for prior approval of Brandeis, the Supreme Court and the nation would never have benefitted from his great legal talents. The presumption that such an outside organization as the American Bar Association is better able to pass upon the credentials of nominees for the federal courts and especially the Supreme Court than the President of the United States who is given the constitutional authority is an erroneous judgment which the passage of time will hopefully see reversed.[39] This is not to imply that ABA views would not be useful to the Executive in its considerations just as they are useful to but not determinative of the actions of the Senate (the Senate having rejected ABA approved nominees Haynsworth and Carswell).

What standard then can be drawn for the Senate from the experiences of the past year in advising and consenting to Presidential nominations to the Supreme Court? They have been set out above but should be reiterated in conclusion. At the outset, the Senate should discount the philosophy of the nominee. In our politically centrist society, it is highly unlikely that any Executive would nominate a man of such extreme views of the right of the left as to be disturbing to the Senate. However, a nomination, for example, of a Communist or a member of the American Nazi Party, would have to be considered an exception to the recommendation that the Senate leave ideological considerations to the discretion of the Executive. Political and philosophical considerations were often a factor in the nineteenth century and arguably in the Parker, Haynsworth and Carswell cases also, but this is not proper and tends to degrade the Court and dilute the constitutionally proper authority of the Executive in this area. The President is presumably elected by the people to carry out a program and altering the ideological directions of the Supreme Court would seem to be a perfectly legitimate part of a Presidential platform. To that end, the Constitution gives to him the power to nominate. As mentioned earlier, if the power to nominate had been given to the Senate, as was considered during the debates at the Constitutional Convention, then it would be proper for the Senate to consider political philosophy. The proper role of the Senate is to advise and consent to the particular nomination, and thus, as the Constitution puts it, "to appoint." This taken within the context of modern times should mean an examination only into the qualifications of the President's nominee.

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[39] *But see Walsh, Selection of Supreme Court Justices*, 56 A.B.A.J. 550-60 (1970); REPORT OF THE STANDING COMM. ON THE FEDERAL JUDICIARY OF THE AMERICAN BAR ASSOCIATION (1970.

In examining the qualifications of a Supreme Court nominee, use of the following criteria is recommended. First, the nominee must be judged competent. He should, of course, be a lawyer although the Constitution does not require it. Judicial experience might satisfy the Senate as to the nominee's competence, although the President should certainly not be restricted to naming sitting judges. Legal scholars as well as practicing lawyers might well be found competent.

Second, the nominee should be judged to have obtained some level of achievement or distinction. After all, it is the Supreme Court the Senate is considering not the police court in Hoboken, N.J. or even the U.S. District or Circuit Courts. This achievement could be established by writings, but the absence of publications alone would not be fatal. Reputation at the bar and bench would be significant. Quality of opinions if a sitting judge, or appellate briefs if a practicing attorney, or articles or books if a law professor might establish the requisite distinction. Certainly, the acquisition of expertise in certain areas of the law would be an important plus in determining the level of achievement of the nominee.

Third, temperament could be significant. Although difficult to establish and not as important as the other criteria, temperament might become a factor where, for example in the case of Carswell, a sitting judge was alleged to be hostile to a certain class of litigants or abusive to lawyers in the courtroom.

Fourth, the nominee, if a judge, must have violated no existing standard of ethical conduct rendering him unfit for confirmation. If the nominee is not a judge, he must not have violated the Canons of Ethics and statutes which apply to conduct required of members of the bar. If a law professor, he must be free of violations of ethical standards applicable to that profession, for example plagiarism.

Fifth and finally, the nominee must have a clean record in his life off the bench. He should be free from prior criminal conviction and not the possessor of debilitating personal problems such as alcoholism or drug abuse. However, this final criterion would rarely come into play due to the intensive personal investigations customarily employed by the Executive before nominations are sent to the Senate.

In conclusion, these criteria for Senate judgment of nominees to the Supreme Court are recommended for future considerations. It will always be difficult to obtain a fair and impartial judgment from such an inevitably political body as the United States Senate. However, it is suggested that the true measure of a statesman may well be the ability to rise above partisan political considerations to objectively pass upon another aspiring human being. While the author retains no great optimism for their future usage, these guidelines are now, nevertheless, left behind, a fitting epilogue hopefully to a most unique and unforgettable era in the history of the Supreme Court.

Senator McConnell. I do not see any point, particularly being this far down the seniority scale, in reiterating all those criteria. We will go into them at length later. I also came back and worked with you, if you will recall, when your own nomination was before the Senate Judiciary Committee.

In the meantime, I, like everyone else, have had a chance to observe your work for the last 15 years, and I want to just tell you, Mr. Justice Rehnquist, it is a privilege to have known you before your nomination, to have worked with you on frequent occasions in those days; to watch the humility, grace, and dignity with which you have handled your position on the U.S. Supreme Court for the last 15 years.

There is no man in the entire country, or woman, in the entire country, in my opinion, better suited for this job, at this particular time, than you are. And so I am excited to support your nomination. It is a thrill to be here and to see you before this group, being proposed for the Chief Justice position, and you can count on my support.

Mr. Chairman, I also had an opening statement which I would also like inserted in the record.

The Chairman. Without objection, so ordered.

Senator McConnell. Thank you, Mr. Chairman.

[The statement follows:]

Prepared Statement of Senator Mitch McConnell

Mr. Chairman, I would like to add my voice today in wholehearted support of the nomination of William Hobbs Rehnquist to be Chief Justice of the United States. I commend and fully endorse President Reagan's selection of Mr. Justice Rehnquist, and urge my colleagues on this committee to expeditiously report out this nomination recommending confirmation without reservation.

After careful consideration of those factors I believe ought to be weighed in evaluating Presidential nominations to the Supreme Court, I have come to the conclusion that Mr. Justice Rehnquist is, professionally, exceptionally well qualified to lead our Nation's highest court. Furthermore, I am pleased to be able to add my personal endorsement of this nominee as well as a man of great integrity, wisdom and foresight. I can assure my colleagues that Bill Rehnquist will not only serve the Court to the utmost of his vast abilities, but perform those duties with distinction.

In 1970, when I served as chief legislative assistant to the then junior Senator from Kentucky, Marlow W. Cook, I had the opportunity to express my views on the judicial selection process in a Kentucky Law Journal article. The occasion for my reflection then was the nominations of Judges Haynsworth and Carswell to the Supreme Court and subsequent Senate action on these nominations. The views I expressed some sixteen years ago continue to guide by thoughts on the judicial selection process today.

At the time, I set forth five criteria by which the qualifications of a Supreme Court nominee might be judged. I said then, and continue to believe now, that our constitutional role in providing the President with our advice and consent in respect to nominations to our Nation's highest court is frankly the most important role the Senate plays. For it is the Supreme Court which guards the most fundamental fabric of our society—the rule of law.

First and foremost, a nominee must be judged competent. Like all nominees to the Federal bench, Justice Rehnquist has been evaluated by the American Bar Association's Standing Committee on the Federal Judiciary. The fourteen members of that committee are charged with evaluating on a professional and objective basis the qualifications of a nominee. That committee, by the way, is also the only non-governmental group that has direct input into the evaluation of a potential Federal judge. In the case of Justice Rehnquist, the ABA committee will have had two separate opportunities to evaluate his qualifications.

In 1971, the ABA committee concluded that:

"Mr. Rehnquist meets high standards of professional competence, judicial temperament, and integrity. To the committee this means that from the viewpoint of professional qualifications, Mr. Rehnquist is one of the best persons available for appointment to the Supreme Court."

Mr. Rehnquist's tenure as Associate Justice of the Supreme Court has certainly substantiated this evaluation. And I am confident that when the ABA committee's present evaluation is presented to this committee, it will not only equal but surpass the previous finding.

The second criterion I proposed to apply to Supreme Court nominees was based upon achievement. Sixteen years ago, in referring to the nomination of one candidate for the Supreme Court, I noted that "[A]fter all, it is the Supreme Court the Senate is considering not the police court in Hoboken, N.J. or even the U.S. district or circuit courts." Our Nation's highest court demands the highest level of excellence. Mr. Chairman, this nominee has more than amply demonstrated that level of excellence.

Mr. Rehnquist has consistently demonstrated a level of professional achievement that all members of the legal profession may envy. After graduation, Mr. Rehnquist served as a law clerk to Mr. Justice Robert H. Jackson. After his clerkship with Justice Jackson, Mr. Rehnquist entered private practice in Phoenix. When he left Phoenix in 1969, to serve in the Justice Department, he was rated at the highest level in Martindale-Hubbell. I can testify from personal knowledge as to his ability as an Assistant Attorney General of the United States. And as the record of this hearing will amply demonstrate, Mr. Justice Rehnquist has excelled as a member of the Supreme Court. Mr. Chairman, I can think of no man better qualified to serve as Chief Justice of the United States.

Third, judicial temperament is vitally important. Service on the Supreme Court demands that an individual possess the highest degree of fairness, integrity, and courtesy. I know from my own experience, that Bill Rehnquist certainly conforms to these standards. As an aside, although I would not characterize it as being a formal prerequisite to service on the Court, I would mention Bill's well developed sense of humor. I am sure that sense of humor has and will continue to promote the necessary comradery among nine individuals engaged in such stressful and intense responsibilities.

The final two criteria I would apply to nominees require that the nominee must have violated no standard of professional conduct rendering him unfit for confirmation, and nor committed any serious impropriety in private life. While I, regretfully, anticipate attempts to cast doubt on Mr. Rehnquist's character on the basis of events delved into at length in his prior confirmation hearing, I am absolutely confident that these attempts will necessarily fail. These allegations speak more to the politics of the confirmation process than to the personal integrity and professional competence of the nominee. The "evidence" brought forward to date has failed to raise even a scintilla of doubt in this Senator's mind. Fortunately, we have not reached the day, I hope, when trial by media rules the confirmation process.

I was particularly troubled by a series of recent articles focused on memoranda produced by Justice Rehnquist during his clerkship with Justice Jackson. In a letter to the editor of the Washington Post, John G. Kester, a former clerk for Justice Jackson, discussed how faulty this line of attack has been. It is precisely a sense of conviction and strength of opinion that makes a clerk valuable to a Justice. I would urge my colleagues to focus on the relevant body of writing—Justice Rehnquist's opinions for the Supreme Court.

While I fully respect the opinions of my colleagues who disagree with the choice of Mr. Rehnquist, and who would have made a different choice, I believe that a heavy burden must be met by those who would have this nominee rejected. Under the Constitution, our duty is to provide advice and consent to judicial nominations, not to substitute our judgement for what are reasonable views for a judicial nominee to hold. I believe that if this nomination proceeds on the merits, William Hobbs Rehnquist will be quickly confirmed as our next Chief Justice of the United States.

The CHAIRMAN. The able and distinguished Senator from North Carolina, Mr. Broyhill.

STATEMENT OF HON. JAMES T. BROYHILL, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator BROYHILL. Thank you very much, Mr. Chairman I appreciate the opportunity to participate in this historic event. In his years on the Court, Associate Justice Rehnquist has proven himself to be a man of great intellect, and also of high integrity.

More importantly, he has continued in his respect for, and has continued a defense of, his views of the Constitution.

Now the President has appointed Associate Justice Rehnquist as the Chief Justice with the full knowledge and recognition of those strong views. The President knows that strong leadership is needed on the Court, and that Justice Rehnquist has shown the capability of carrying out that responsibility.

The president also has the right, and I think the responsibility, to nominate a person who shares his views on the interpretation of the Constitution.

I look forward, Mr. Chairman, to the exchange of views in these hearings, and participation of these witnesses before the committee. Thank you very much.

The **Chairman**. Thank you very much. Is Senator Ted Stevens in the Hall? He indicated he wanted to make a statement.

[No response.]

The **Chairman**. Senator Stevens can place his statement in the record or he can come later, as any other Senator can.

Now, we will have one witness this afternoon whose wife is in the hospital and he has got to leave. That is the Honorable Griffin Bell, a former circuit judge. Judge Bell, if you will come around.

Judge Bell, if you will stand and be sworn. Will the evidence you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **Bell**. I do.

The **Chairman**. You may proceed.

TESTIMONY OF HON. GRIFFIN B. BELL, KING & SPALDING, ATLANTA, GA

Judge **Bell**. Mr. Chairman and members of the committee, I have a statement which I have submitted and I would ask that it be included in the record.

The **Chairman**. Without objection, so ordered.

Judge **Bell**. I will make a very short statement, based on the paper that I have submitted.

I appear in support of the President's nomination of the Honorable William H. Rehnquist to be Chief Justice of the United States.

I have known Justice Rehnquist since shortly after his appointment and confirmation to be an Associate Justice of the Supreme Court, and have followed his career, as well as his writings on the Supreme Court. In fact I have followed the opinions of the Court throughout the period of his service, 15 years of service on the Court.

We are inclined, as Court watchers, to divide the members of the Court into liberals, moderates or centrist, and conservatives. Some of the Justices move from one category to another, depending upon the subject matter before the Court.

Probably Justice Brennan is more steadfast in his positions on the liberal side than any other member of the Court, or as much so. And perhaps Justice Rehnquist occupies an opposite position on the conservative side. I do not consider either Justice Brennan or

Justice Rehnquist to be extremist. We are fortunate in our country, that we do not have an extremist, in my judgment, on the Supreme Court.

They can be compared, because they are—that is, Justice Brennan and Justice Rehnquist—because they are true leaders on the Court. They are bright, articulate, well-versed in constitutional and statutory law, and judicial philosophy. And because they reason from a firmly held philosophical view of the Constitution, and the role of the Court in American society.

As such they are similar in that they render reasoned decisions, based, in most part, on their philosophical leanings, and, as such, are predictable.

Justice Rehnquist is a leader on the Court, because of his towering intellect, his well known and recognized capacity as a constitutional law scholar, and because he is, beyond doubt, greatly respected by the other members of the Court.

These are the elements required for one to be a great Chief Justice. It has been said that Justice Rehnquist takes conservative positions in criminal law. Some equate the individual rights of criminal defendants with the great concepts of social justice for the downtrodden. This is a good approach, but one that sometimes overlooks the rights of society. Among the criminal defendants class are many people who are trafficking in drugs and dealing in violence, and are not downtrodden at all. Society needs to be protected from them.

The criminal justice system must be workable, and Justice Rehnquist has adopted views that tend in that direction. The Burger court has not set aside landmark decisions, such as those that have afforded the right to counsel, *Miranda* rights, or the exclusionary rule.

In some instances, Justice Rehnquist has joined in making those great rights more workable, and thus preserving them. The good faith exception to the exclusionary rule is a good example of Justice Rehnquist's role in saving the exclusionary rule from its own excesses.

The same may be said of some of the fourth amendment rulings of the Court. I spent some time on the lower court myself, and that is the most difficult area of the law, that is, what to do with some of the fourth amendment cases.

These criminal decisions have not been the work of extremists, but of Justices of good will, reasoning together within liberal and conservative parameters.

It has been said that Justice Rehnquist believes that some attention should be paid to the original intent of the drafters of the Constitution. It has also been said that he believes that the Court has been too expansive in its use of the 14th amendment, particularly the due process and equal protection clauses. I read somewhere, Professor Howard's article, I believe, that he thinks the 14th amendment should be restricted to what it was originally enacted to do, and that was to eliminate racial injustice.

Well, he is entitled to these views. It would be certain that a lot of people would not agree with those positions, but he is certainly—they are not extreme and he is entitled to those views.

It has been said that his views of the first amendment, freedom of religion clause, are such that he goes back to the Framers' intent, and he does not believe that the Constitution requires the Government to be neutral as between religion and irreligion. This view has substantial underpinnings in history, and is by no means unreasonable. Justice Rehnquist has a decent respect for federalism. He has some appreciation of the role that the States occupy in our governmental structure, especially in health, safety and education.

I think that his views in these areas are the ones that I read, that people think are unusual, and while they are debatable, they certainly are not extreme, and——

The **Chairman**. Judge Bell.

Judge **Bell**. Yes, sir.

The **Chairman**. We are having a vote in the Senate, and we just have about 4 minutes left to vote.

Judge **Bell**. I need 1 minute.

The **Chairman**. We will take a recess and come back in about 10 minutes.

Judge **Bell**. All right.

The **Chairman**. We will take a recess at this time for 10 minutes.

[Recess.]

The **Chairman**. The committee will come to order.

Judge Bell, you may now continue with your testimony.

Judge **Bell**. Mr. Chairman, I had almost finished. I was just getting ready to say that under the constitutional system, the President has the right and the duty to nominate the Chief Justice and the Senate has the power to advise and consent. One of the most important issues in any Presidential campaign is what type of justices and judges will a particular candidate appoint to our courts.

President Reagan carried 49 States, and the people were well aware of his views on the judiciary. There has never been any doubt that he intended to appoint conservatives. This was an issue that was resolved by the election.

I was asked once when I was Attorney General on "Meet the Press," I think it was, why we did not appoint more Republicans. And I said, "Well"—I hedged on the question—and finally, I said, "Well, I have to say that we do not have an affirmative action program for Republicans."

That is what the Presidential election is about in this country. If we want to get Democrats, or more liberal people on the courts, we will have to win the election.

The President has nominated Justice Rehnquist, and I think he has to be tested to see if he possesses integrity, ability, leadership capacity, intellectual attainment, and good health; and on top of that, I would want to be certain that he had a modicum of common sense. It seems to me that he meets all of these standards and that the President's nominee for Chief Justice should not be rejected. He has a public record of 15 years on the Court, and I think his record supports that same conclusion.

Were I a Senator, I would vote to confirm Justice Rehnquist as Chief Justice. I would do so with a decided view that he would serve our Supreme Court and our Nation well.

I thank you, Mr. Chairman.

The **Chairman**. Thank you very much, Judge. We are very pleased to have you here. You would have made a great member of the Supreme Court yourself.

Senator Metzenbaum—no, Senator Biden.

Senator **Biden**. No; go ahead.

Senator **Metzenbaum**. Judge Bell, you supported the Brad Reynolds nomination in an op-ed piece. As you know, this committee turned down his confirmation.

Judge **Bell**. I am well aware of that.

Senator **Metzenbaum**. And you were paid by E.F. Hutton to prepare a report supporting the Justice Department's conclusion not to bring criminal prosecution against the E.F. Hutton $10 billion check-kiting case. And now, you testify today. One almost begins to get the feeling that you are the Republicans' favorite Democrat; when they need a Democrat, they look to Griffin Bell.

Let me ask you, has the administration or somebody spoken to you about coming up here to testify today?

Judge **Bell**. Well, I volunteered to testify.

Senator **Metzenbaum**. But before you volunteered, did somebody call you, or did you call them?

Judge **Bell**. No, I did not——

Senator **Metzenbaum**. And if you did call somebody whom did you call?

Judge **Bell**. No, no; I did not call them.

Senator **Metzenbaum**. Who did you call?

Judge **Bell**. I did not. Somebody called me and asked me if I would like to testify for Justice Rehnquist, and I said yes, I would be glad to; I have already spoken out for him on three television stations in Atlanta.

Senator **Metzenbaum**. Who called you?

Judge **Bell**. Brad Reynolds. [Laughter.]

Senator **Metzenbaum**. He is the one—you and Brad Reynolds—well, I will withdraw that.

Judge **Bell**. We are friends.

Senator **Metzenbaum**. Pardon me?

Judge **Bell**. Mr. Reynolds and I are friends. I have known him since he graduated from Vanderbilt Law School. I tried to recruit him as a law clerk, and I have known him over the years. I almost gave him a job when I was Attorney General, but I never could find one that suited him.

Senator **Metzenbaum**. Well, as you know, this committee could not find one that suited him, either, or else he did not suit us. [Laughter.]

Judge **Bell**. Well, he has got a job, and he was confirmed over here once.

Senator **Metzenbaum**. That is true, and also was denied confirmation——

Judge **Bell**. Once.

Senator **Metzenbaum** [continuing]. On the other occasion on which you wrote the op-ed piece.

Judge **Bell**. Right. As I told you recently when I was here, I have a right as an American to write that article.

Senator METZENBAUM. Now, let me ask you this. In the *Batson* case, Justice Rehnquist took the position that you could strike all blacks from juries. Do you agree with that position?

Judge BELL. No.

Senator METZENBAUM. Justice Rehnquist, in *Wallace* v. *Jaffrey,* took the position that the Government can promote religion as long as it does not favor a particular religion. Do you agree with that position that he took in that case?

Judge BELL. Almost. I agree that the Constitution does not require the Government to be neutral as between religion and no religion. But I do not think the Government ought to promote religion. You see, there is a difference in the way you said that. It is sort of like the difference between what I did for E.F. Hutton and the way you stated your question a minute ago. [Laughter.]

Senator METZENBAUM. Well, I think that we will get into that. You were hired by E.F. Hutton, and——

Judge BELL. There is no question about that—but I was not hired to do what you said I was hired to do.

Senator METZENBAUM. Well, let us say that the result——

Judge BELL. If you want to have a hearing on that, we will have one.

Senator METZENBAUM. Let us say the result came out that way. Do you think that government can promote religion?

Judge BELL. No; I think there is a line between neutrality. I said I do not think the Government has to be neutral, but I said I am not certain that I think the Government ought to promote religion. The next thing you know, they are writing a prayer, you see, and you cannot go that far. There is a big balance always in constitutional law, and there are nuances, and we are dealing in one right now.

Senator METZENBAUM. Well, we are dealing with more than nuances, because in the case of *Wallace* v. *Jaffrey,* as I understand it and as I read it, it indicates that the nominee for Chief Justice had taken the position that the Government can promote religion as long as it does not favor a particular religion. In fact, if my recollection serves me right—and I do not have the case in front of me—I think some of that actual language is included in Justice Rehnquist's dissent.

And I am trying to find out from you—you are testifying for him; you say you think he would be a good Chief Justice of the Supreme Court, and I am just trying to find out, whether you are here just as an accommodation to the administration, or if you sincerely believe this.

Judge BELL. I think he is a very fine Justice.

Senator METZENBAUM. I think he is a very fine man, too.

Judge BELL. All right. Now, that does not mean that I would agree with every decision he has written. I did not come here to endorse a check of any sort. I just came here to say that I think he is a very fine judge, and I think he writes reasoned opinions—you can understand his opinions and where he is coming from—and I do not think he is an extremist. I think he is a conservative. And maybe I am somewhat more liberal than he is, and perhaps you would be. But that does not mean he is not entitled to be on the

Supreme Court, or that the President is not entitled to nominate him. That is what we are having the problem about.

Senator **Metzenbaum**. Nobody denies the President's right to nominate him, nor are we at issue with whether he has a right to be on the Supreme Court. The issue before us now is should he be confirmed Chief Justice of the Supreme Court, which is a totally different issue, and I am sure you agree with that.

Judge **Bell**. Fine, fine; surely.

Senator **Metzenbaum**. You raised the issue of extremism, although some of us in our opening statements have talked about that. Let us assume for the moment—and I am not asking you to accept this as a fact—but let us assume that this committee were to conclude that Justice Rehnquist is an extremist, or takes the most extreme view. If we were to reach that position—and I am not saying that we can or will—but if we were to reach that position, do you have an opinion as to whether or not, if we came to that conclusion, that it would be an appropriate basis on which to reject his confirmation?

Judge **Bell**. Well, stated differently, I would not support him if I thought he was an extremist. He could not lead the Court. No extremist could lead the Court. Getting a majority on an appellate court is a very difficult thing in these close cases, and one of the things you have to do is be enough of a leader to forge a majority. And I do not think any extremist would be able to do that, so he would not have the necessary leadership capacity to be a Chief Justice.

Senator **Metzenbaum**. I think that answers my question.

I thank you.

Judge **Bell**. Thank you.

The **Chairman**. The distinguished Senator from Wyoming, Senator Simpson.

Senator **Simpson**. Mr. Chairman, when I came here in 1979, I was in the minority, and I remember very distinctly coming to know Attorney General Griffin Bell. I do not review him as a hired gun type of person. I view him as a man of great ability, great, good intellect, great common sense, and great good humor. I think it would be unfortunate to leave the impression that he just shows up to handle the Republican cause every once in a while. He was a pretty rabid Democrat when I remember him from my day.

It is always a pleasure to have you here because you have something to impart, and what you impart is your impressions of a person that we are going to have to confirm. You have never held back in my time of knowing you, and I admire that. I think you are not here to rehabilitate anybody.

Mr. Metzenbaum has not even started. Lord's sake, we will all have to be rehabilitated when we get going on that.

Senator **Metzenbaum**. I am not sure it is possible.

Senator **Simpson**. But I think it is important to know that you are a man that served a Democratic administration, and in that capacity, I have the greatest regard and admiration for you, and I say that again.

Judge **Bell**. Thank you.

Mr. Chairman, if I may say so, my first duty is to be an American, and after that, I will decide what my political position is.

Senator Biden. Mr. Chairman.

The Chairman. The distinguished Senator from Delaware, Senator Biden.

Senator Biden. Judge Bell, I would like to talk to you not as a Democrat or a Republican, or whether you are a rabid Democrat as the Senator from Wyoming suggests, or how deeply you hold the view you have. I would just like to talk to you about your experiences having been a judge yourself.

In your opinion, Judge, had the so-called Nixon tape case been decided 5-to-4—well, there were 8 Justices—say, 5-to-3—would that have had any impact upon the Republic at the time, as opposed to a unanimous decision, 8-to-0?

Judge Bell. Decidedly so.

Senator Biden. In what way would it have?

Judge Bell. It would have meant the—people often have doubt as to whether a Supreme Court decision is the law. And if it is a close decision, 5-to-4, or something like we have been getting in recent years, what we call the plurality opinion, people are not inclined to follow those decisions, and they do not know for sure what the law is. They say if there had been one different judge, it would not have come out that way.

In the Nixon tape case, it was very important for our Nation that it be decided unanimously, and it was. The *Brown* decision was another example. The *Brown* decision was hard enough to carry out, and if there had been a divided Court, it would probably not have been carried out. As you know, Congress failed to act for so many years, and the courts were having to do it on their own, particularly the Southern courts, and we would not have been able to do it had ~~that not~~ been a unanimous decision.

There are certain great issues that face our country, where you ought to—and usually do—get a majority or almost a majority. These are some of these cutting edge issues that face society.

Senator Biden. I could not agree with you more. Both the *Brown* case, as you point out, which was unanimous—and as I understand, if you read the Court—and you, having been on it, understand—not the Supreme Court, but the Federal Bench—you understand this much better than I—we lawyers are the last people to understand how juries work, and we Senators are really, I guess, maybe least informed as to what happens in a conference, when you all close the door, and you sit down, and what you do as judges—I am not asking you to comment on that now. But the histories that have been written of the Warren era, during the *Brown* decision, and the book—less historical, some would argue, than others—but several books written that cover the period of the Nixon tapes case, indicate that in both instances—in one case, Chief Justice Burger; in the other case, Chief Justice Warren—lobbied very hard the Court, their colleagues. Without going into any detail now, I think it is accepted as historically accurate that Justice Warren felt very, very strongly that one Southern judge on the Supreme Court—he was reluctant to go along with the *Brown* case—should join, because he felt that if, in fact, that one well-known Southern jurist concluded that the Court was wrong that it would have been very difficult, or maybe even resulted in some physical bloodshed, in attempting to—I do not want to exaggerate, and I am not suggesting civil war, but it was pretty serious.

Judge **Bell**. No; but I think that is a fair assessment of the situation.

Senator **Biden**. Now, having said that—and I truly have an open mind on this—one of the things about the role of the Chief Justice is, as you point out, they must be able to lead the Court in that regard. Can you tell me—and you can amend this question in any way it is suitable for you—are there any particular Chief Justices that you have admired as a student of history, that you have admired more than others—whether you go back to Marshall or to Justice Burger? I mean, leaving Justice Burger aside, whom we all admire——

Judge **Bell**. Well, I have only known three Chief Justices.

Senator **Biden**. That is pretty good out of 15.

Judge **Bell**. Vinson and Warren and Burger—and they were all quite different. I was just a young law student and a young lawyer when Vinson was the Chief Justice. He had been in the Government here a long time, and I do not know that he was Chief Justice long enough to make a mark. But we were in a period of history when not much was going on.

When Chief Justice Warren came on, he was a very dominant personality, and had decided views, deeply held philosophies, and was a great leader. And he started addressing the social ills of the Nation, and it required the use for the first time in many years of the 14th amendment and a complete refurbishment of the law under the 14th amendment. And he was able to do that. He paid very little attention to the court system as a whole. He was more interested in these great issues, social issues.

When Chief Justice Burger came on, most everything had been done under the 14th amendment's refurbishment, as we used to say, and they started maybe rounding out some rough spots on some of the opinions. But he became very interested in the court system as a whole,, and he realized that you could lose your rights because you could not get a hearing, and that the procedural side of the law was in disrepair. And he spent his time emphasizing that.

So, they all were different.

John Marshall, of course, he was writing on almost a clean slate, so he is the most famous Chief Justice of all for that reason. But we have had some other times where we did not—we never should have had the *Dred Scott* decision, for example. That is an example of the Court going the wrong way.

There was something said here today I wanted to mention, now that you have brought this up, about the dissent, that Justice Rehnquist had dissented too many times. The great dissenter, one of the greatest that has ever been and one of the most famous, and a man I have always admired almost more than any other Justice, is Justice Oliver Wendell Holmes. He was called the great dissenter. And in the *Leo Frank* case, which was a disgraceful case from Georgia, Justice Holmes and Justice Hughes dissented on the grounds that the Court should have considered whether there was mob violence at his trial, as a part of your right under the writ of habeas corpus. And the Court ruled 7-to-2 that that was outside the jurisdiction of the habeas corpus, that writ. In a very short time, Leo Frank was taken out of jail in Georgia and hanged by a mob. The very thing that he contended happened to him at his trial. Five years later, Justice Holmes, or Justice Hughes—I have forgotten which; one or the other of them—wrote a majority opinion, this time 7-to-2, holding just the opposite in the case of a prisoner from Arkansas who contended that you should be able to raise that question under the Federal writ of habeas corpus.

That is a good example of dissent. Sometimes you feel strongly about something, and eventually—and this happened to Holmes a lot of times—eventually, his views became the majority. But you have to start out if you have strong views about things. Now, that is different from somebody that just dissents to be dissenting.

There is an article written by Justice Hutchison, who was Chief Judge of the Fifth Circuit where he made quite a strong talk against Justices for dissenting without any good reason to dissent. That is different.

Senator BIDEN. Justice Holmes and Justice Hughes—but in Justice *Holmes'* case, was an Associate Justice, not the Chief Justice—but your point is, I think, very accurate and very well taken, and historically precise.

Let me ask you two more short questions. Do you think that Justice Douglas would have been a good Chief Justice at the time that he was on the bench?

Judge BELL. No; I tell you, I do not think he would have.

Senator BIDEN. Why?

Judge BELL. I do not think he had any interest in being Chief Justice. I think you have to want to do it. And I think he had such a bright mind, and he was so interested in so many different things besides being an administrator, that he would not have been a good Chief Justice. That takes nothing away from his ability.

One of the great statements I ever heard was when Justice Rehnquist was nominated to be an Associate Justice, some conservative writer somewhere said that the President had put Justice Rehnquist on the Court to trump Justice Douglas.

Senator BIDEN. I think that is an accurate—I do not know if that is historically accurate, but I think——

Judge BELL. No, I do not, either. I just remember that. I do not know.

Senator BIDEN. You have great knowledge and experience in this area, but I know other of my colleagues want to speak. Let me just wish your wife well.

Judge BELL. Thank you. She has had terrible arthritis, and she's had her hip joints replaced, and she's doing well.

Senator BIDEN. I know it's painful, and one of our colleagues has recently gone through that on several occasions, and I know from observation it's difficult. My best wishes.

The CHAIRMAN. The able Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman. I extend my regards to your wife, too. I suggest she try Arizona, Judge; that would help her, I hope.

Judge Bell, you represented E.F. Hutton up here before the committee. You were paid a fee for that?

Judge BELL. Oh, yes.

Senator DeConcini. When you came here and testified for Mr. Reynolds, were you paid a fee for that?

Judge Bell. No.

Senator DeConcini. And have you been paid a fee——

Judge Bell. I did that out of a friendship and because I thought he should have been confirmed.

Senator DeConcini. And have you been paid a fee for testifying today?

Judge Bell. Oh, no, not at all. I am very happy to be here to testify as a citizen for Justice Rehnquist.

Senator DeConcini. There is a certain distinction upon the reason you are here in behalf of Justice Rehnquist, and of course the reason you were here on behalf of your client, E.F. Hutton.

Judge Bell. No, I was paid by E.F. Hutton. And a reporter asked me one day if I didn't think that since I was doing a special investigation, if it wasn't wrong for them to pay me. And I said, well, can you think of someone else who would pay me? [Laughter.]

And I would have been glad for someone else to pay me.

Senator DeConcini. My point, of course, is that you make a living practicing law and you charge your clients a fee.

Judge Bell. Exactly.

Senator DeConcini. And, as a personal matter, you also have an opinion, being a former judge and Attorney General, as to the qualifications of certain appointees.

Judge Bell. Right.

Senator DeConcini. That's why you are here today.

Judge Bell. Exactly.

Senator DeConcini. Judge Bell, when you were Attorney General, you made a number of recommendations to President Carter, is that correct, as to judges?

Judge Bell. I did—over 200.

Senator DeConcini. Over 200. Was one of those Patricia Wahl?

Judge Bell. Yes.

Senator DeConcini. She was an employee, I think, of——

Judge Bell. She was Assistant Attorney General in charge of the Legislative Affairs Office, same job Senator McConnell used to have.

Senator DeConcini. She was considered a very liberal nominee, is that correct?

Judge Bell. That's what people said about her.

Senator DeConcini. And she has obviously distinguished herself on the circuit court here of the District of Columbia?

Judge Bell. Made a fine judge, I'm told—everybody thinks so. And I've read some of her opinions. I think she has.

Senator DeConcini. And is it true also, Judge Bell, that you recommended to President Carter the appointment of Mary Schroeder for the ninth circuit, and Bill Canby of the ninth circuit, which happened to be recommendations of mine?

Judge Bell. True.

Senator DeConcini. My point being that you were very able to pick qualified people, whether they may fall on the liberal spectrum or on the conservative spectrum, is that safe to say?

Judge Bell. I never did pay any attention to whether they were liberal or conservative. Naturally, with Democrats, I think maybe you get more liberals, but we put some conservatives on the court. But we put more liberals on it.

Senator DeConcini. You are interested primarily in those recommendations for—what were the main criteria you used in recommending someone to President Carter when you were in that position?

Judge Bell. Well, I was looking for ability, things I listed here a minute ago—ability, integrity, and good health—I wanted them to be able to serve for a good long while. And I never did tell the President whether they were conservatives or liberals.

Senator DeConcini. So that same standard is what has brought you here in support of Justice Rehnquist's nomination, is that correct?

Judge Bell. Well, I have this unusual feeling that our country would do better if we paid more attention to excellence, and Justice Rehnquist happens to be excellent. His career is one based on excellence.

And I was asked by all three of the television channels in Atlanta, after his appointment was announced, if I would say something about the appointment, and I took the same position about Judge Scalia, that they both are people that have excellent records. And it made me feel good that we were going along that route.

Senator DeConcini. So in your judgment and standard the fact that they are liberal or conservative is certainly not the primary judgment or measure of whether or not they would be——

Judge Bell. Well, I know that this committee would not consider that in making its judgment, because it would be really against the Constitution to try to block a conservative or block a liberal. And I never had any trouble with the Republicans trying to block a liberal.

Senator Biden. I can remind you of a couple, Judge.

Senator DeConcini. I can, too.

Judge Bell. Well, I can't remember them.

Senator DeConcini. But, Judge Bell, as to your measure or criterion, that is not a measure as to whether some should be or not be appointed.

Judge Bell. It should not be. That's inherent in the system, it's according to who the President—is the way I look at it. I may not understand the Constitution, but I think I do, and I think that's part of the system.

Senator DeConcini. I thank you, Judge. I have no further questions.

The Chairman. The distinguished Senator from Alabama.

Senator Heflin. Judge Bell, you served on the fifth circuit for what period of time?

Judge Bell. 1961 to 1976.

Senator Heflin. You were on the fifth circuit when Justice Rehnquist served for several years as a member of the Supreme Court.

Judge Bell. Exactly. I sent him one law clerk. That's my only connection with Justice Rehnquist. I didn't send him to him, he hired one of my law clerks.

Senator Heflin. Did he ever reverse you?

Judge BELL. I'm sure he did. If he didn't, he was the only Justice that didn't. [Laughter.]

Senator HEFLIN. There's been a question raised of race and gender. During your term as Attorney General, do you remember how many blacks were put on the Federal bench with your recommendation?

Judge BELL. I don't have the number, but more than had ever been put on the Federal courts in the entire history of the Nation added together we put on in 2½ years, and the same with women.

Senator HEFLIN. During the time that you served on the fifth circuit, was the fifth circuit the battleground for civil rights in this country?

Judge BELL. Absolutely. I was called a school superintendent of Mississippi at one time, but when I was up to be confirmed as Attorney General I didn't get much credit for anything I ever did with that. I thought at the time I was really doing a lot.

But it was a battleground.

Senator HEFLIN. I don't believe anybody can question your background and history in regard to civil rights, your belief in individual justice toward gender and race. And I compliment you on your fine record.

Judge Bell, this appointment—it seems to me that we need to hone in on the issues, and we sometimes get off on matters that have already been decided. Justice Rehnquist has not resigned from the Supreme Court, has he?

Judge BELL. Oh, no.

Senator HEFLIN. If he is not confirmed as Chief Justice, you would expect him to serve there as long as if he was confirmed as Chief Justice, would you not?

Judge BELL. Oh, yes, I'm sure he will. This is just what you might call an elevation.

Senator HEFLIN. Therefore he is a voting member and his ideology as we confront it, has pretty well been decided; he's going to serve and he will be voting on cases and expressing that ideology.

The issue, as I see it, is the difference between him as a Justice and him as a Chief Justice. And one aspect is the idea that I think Senator Biden was directing, one toward being a leader and toward being a consensus-builder.

Now, your experience for many years on the bench—and the fifth circuit had a number of chief judges during that particular time—doesn't it also involve, to some degree, to the ability to build a consensus or to be a leader, to try to obtain a unanimous decision, to depend upon the strength and the support of lieutenants.

Judge BELL. Other judges.

Senator HEFLIN. Other judges that may be, in effect, lieutenants to the Chief Justice.

Judge BELL. Oh, yes.

Senator HEFLIN. Therefore, a single Chief Justice by himself without some support toward trying to bring about a unanimous decision, such as in the Watergate tapes case or the *Brown* v. *Education*, may well be influenced and will be a matter of whether the result is obtained by some support and the strength of his supporters, to some degree.

Judge **Bell**. Oh, that's very true, and if you think about the *Brown* case, the great judges that we had on the Court—some of them were as strong as the Chief Justice.

I'd say if you had a dominant Chief Justice and weak Associate Justices, you'd have a bad situation. But no Chief Justice could do much unless he had some strong support. You've got to have two or three other judges of like view.

Senator **Heflin**. We therefore look at, in trying to define the issues that are before us, what we should look at—we see leadership, ability as a consensus builder; and then we see the leadership role that the Chief Justice plays toward the entire American system of justice, which is a distinction from being an Associate Justice of the Supreme Court.

Judge **Bell**. Exactly.

Senator **Heflin**. That role, as we look toward the future, can be a very important role and a role that will demand leadership, as we face the problems that are going to confront the judicial system the rest of this century and into the next century. We've become a quite litigious nation, and there are many aspects.

What is your feeling concerning Justice Rehnquist's ability as a leader of the entire justice system?

Judge **Bell**. I've said something about that in my prepared statement. This is something I considered separately. Is he a type person who would take the time to be the leader of the whole Federal judicial system, and to some extent the State system?

Justice Burger's done a fine job on that, and I hearken back to the time when I was head of—I was chairman of the division of judicial administration, you will recall, of the American Bar Association, back when I was on the bench. Justice Rehnquist, although a young judge at the time, took an interest in this division and one year was a speaker at the annual dinner, I recall—and I don't know of anything that would indicate that he wouldn't do his duty, his extra duty that the Chief Justice has, to run the court system.

But that will be something he'll have to face, and I am sure he will address that when he testifies.

But you've got to remember that that is a very important point, as you are pointing out now, of being Chief Justice. The American people can lose more rights because the procedures in the lower courts are not right than they are ever going to lose in the Supreme Court. There are very few Americans who ever have a case in the Supreme Court; a lot of them are going to be in the lower courts, and you have to be certain that they are operating the way they should operate.

And you'll have to ask him, because he has not had that much experience dealing with the lower courts.

Now, in the last year or two, the Chief Justice has been assigning him some things; for example, the American College of Trial Lawyers group that I am affiliated with is getting ready to sponsor a legal exchange between Canada and the United States. And the Chief assigned that duty to Justice Rehnquist—and that is just beginning right now. And the Anglo-American exchange, I believe he assigned that to Justice O'Connor.

But the Chief was beginning to put him in that sort of a role. But you need to ask him that question. It's an important question.

Senator HEFLIN. I have attempted to define some issues that are before us, such as leadership of the Court as distinguished from a mere voting member and an opinion writer of the Court, either dissenting or majority concurring or otherwise—the leadership of the judicial system.

What other distinctions do you see between an Associate Justice and the Chief Justice?

Judge BELL. Well, the Chief Justice has got to preside over impeachment trials. Now, Chief Justice Burger, I assume, will be presiding in a few days in the Senate on the Claiborne impeachment—that's an extra duty. For some reason, the statute requires that the Chief Justice be the Chairman of the Board of the Smithsonian—I've never known why that is, but that is true.

And then you have to keep up good relations with the State courts and be certain that the National Center for State Courts is operating.

It's a very broad-gauged job, and it would be unfortunate to have someone in the Chief Justice's job who ignored everything but just the Court. On the Court he is one among equals, as somebody said today. But he does get to assign the writer of the majority opinion, but only if he is in the majority group—only if he is in that group. If he's not in the group, then the senior Justice who is in the group that makes the majority assigns the writer.

Senator HEFLIN. Well, there may be other things that we would look at as we go along, but I think you've covered most of them. There may be other issues or distinctions to which we would be addressing a lot of inquiries.

Judge BELL. Well, you've been a Chief Justice, so you perhaps can counsel with your brothers and sisters about it.

The CHAIRMAN. The distinguished and able Senator from Illinois.

Senator SIMON. I thank you, Mr. Chairman. I have no questions for Judge Bell.

The CHAIRMAN. Judge, I have just one question.

Judge BELL. All right, sir.

The CHAIRMAN. Is it your opinion that Justice Rehnquist has the competency, the dedication, the courage, the character, the compassion, and the fairness to make a great Chief Justice?

Judge BELL. That is my opinion.

The CHAIRMAN. You are now excused.

Judge BELL. Thank you. I appreciate your taking me out of turn, your honor.

The CHAIRMAN. Thank you very much.

[The following was received for the record:]

STATEMENT OF GRIFFIN B. BELL

BEFORE
THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
IN SUPPORT OF THE NOMINATION OF
HONORABLE WILLIAM H. REHNQUIST
TO BE CHIEF JUSTICE

I appear in support of the President's nomination of Honorable William H. Rehnquist, now an Associate Justice of the Supreme Court of the United States, to be Chief Justice of the United States. I have known Justice Rehnquist since shortly after his appointment and confirmation to be an Associate Justice of the Supreme Court and have followed his career as well as his writings on the Supreme Court. In fact, I have followed the opinions of the Court throughout the period of his service.

In addition, several years ago I served while a member of the federal judiciary as Chairman of the Division of Judicial Administration of the American Bar Association. Justice Rehnquist took and takes a keen interest in the activities of the lower courts of our nation and was the principal speaker at one of the annual meetings of the Division of Judicial Administration.

I am familiar with the Office of Legal Counsel at the Department of Justice and know of the service of Justice Rehnquist as Assistant Attorney General in charge of that office just prior to his service on the Supreme Court. I am not familiar with his service as a lawyer or his activities as a law student. I do know of the brilliant record that he made as a law student at Stanford.

We are inclined as court watchers to divide the members of the Court into liberals, moderates or centrists, and conservatives. Some of the justices move from one category to another, depending on the subject matter before the Court. Probably, Justice Brennan is more steadfast in his positions on the liberal side than any other member of the Court or as much so, and perhaps Justice Rehnquist occupies an opposite position on the conservative side.

Justices Brennan and Rehnquist are true leaders on the Court because they are bright, articulate, well-versed in Constitutional and statutory law and judicial philosophy, and because they reason from a firmly held, philosophical view of the Constitution and the role of the Court in American society. As such, they are similar in that they render reasoned decisions based in most part on their philosophical leanings, and as such are predictable. The thing most lacking in American law today is predictability, and these two Justices in particular give some hope to the American lawyer and the American public toward a day when we can again predict to a reasonable degree what the law is and will be in the foreseeable future.

Justice Rehnquist is a leader on the Court because of his towering intellect, his well-known and recognized capacity as a Constitutional law scholar and because he is, beyond doubt, greatly respected by the other members of the Court. These are the elements required for one to be a great Chief Justice.

As an aside, it may well be that his views will be tempered somewhat as he begins to live with the discipline that comes from the responsibility of being Chief Justice and the necessity to forge majority opinions on the great issues of our time. In recent years we have seen too many plurality opinions. There is some consternation in our nation in certain areas of the law because we have never been able to receive a solid majority view from our Supreme Court. Affirmative action is but one example. There are certain matters that should be put to rest by the Court; our nation deserves to know what the law is on some of the difficult social issues.

It has been said that Justice Rehnquist takes conservative positions in criminal law. Some equate the individual rights of criminal defendants with the great concepts of social justice for the downtrodden. This is a good approach but one that sometimes overlooks the rights of society. Among the criminal defendant class are many people who are trafficking in drugs or dealing in violence and are not downtrodden at all. Society nees to be protected from them.

The criminal justice system must be workable, and Justice Rehnquist has adopted views that tend in that direction. The Burger court has not set aside landmark decisions such as those that have afforded the right to counsel, Miranda rights, or the exclusionary rule. In some instances Justice Rehnquist has joined in making those great rights more workable and thus preserving them. The good-faith exception to the exclusionary rule is a good example of Justice Rehnquist's role in saving the exclusionary rule from its own excesses.

The same may be said of some of the Fourth Amendment rulings of the Court in which Justice Rehnquist has participated. We can be proud that our Constitutional rights have been preserved; we can be reassured that they have been fashioned, refashioned, and preserved in a system where Justice Brennan and Justice Rehnquist and those other Justices with views in between have debated, reasoned and reached conclusions that are in the interests of the individual and society. This has not been the work of extremists but of justices of good will reasoning together within mere liberal-conservative parameters.

Justice Rehnquist apparently believes that the original intent of the drafters of the Constitution should be ascertained when interpreting the Constitution where possible. It has been said that he also contends that the Fourteenth Amendment was drafted to prevent racial discrimination and should not have been extended beyond that. He is certainly entitled to these views. As to the latter position, he has had little success in preventing the Court's expansive use of the due process and equal protection clauses of the Fourteenth Amendment far beyond racial matters. It is highly unlikely at this point in our history that such a view of the Fourteenth Amendment, if he holds such a view, will ever prevail.

Justice Rehnquist's views on the First Amendment and Freedom of Religion rest on his reading of the framers' intentions and his belief based thereon that the Constitution does not require government to be neutral as between religion and irreligion. This view has substantial underpinnings in history and is by no means unreasonable.

Justice Rehnquist has a decent respect for federalism. This should not be a ground for criticism. Our government is structured on federalism. Senators for a large part of our history were elected by the state legislatures to represent the states. The states occupy a very important role in our governmental structure, especially in health, safety and education. I believe that senators still have a duty to see to the interests of the states along with the interests of the people and the federal government despite the fact that we amended the Constitution to provide for popular election of senators.

Lastly, I would like to note that under our Constitutional system the power to nominate the Chief Justice and the Associate Justices was and is vested in our President. This came after considerable debate at the constitutional convention where some urged that the Senate be in charge of appointing judges. The matter was resolved by placing the power in the President with the right and responsibility to advise and consent being placed on the Senate. I think it important that we take care not to denigrate our constitutional system by attempting to substitute the Senate for the President in the nomination process.

One of the most important issues in any presidential campaign is what type of justices and judges will the particular candidate appoint to our courts. President Reagan carried forty-nine states, and the people were well aware of his views on the judiciary. He intended to appoint conservatives. That was an issue that was resolved by the election. He is entitled to his nominees in my judgment if they meet suitable levels of qualification based on integrity, ability, intellectual attainment, and good health. A modicum of common sense is also important. It seems to me that Justice Rehnquist meets all of these standards and that the President's nominee for Chief Justice should not be rejected. His public record of 15 years on the court supports this conclusion.

Were I a senator, I would vote to confirm Justice Rehnquist as Chief Justice. I would do so with the decided view that he would serve our Supreme Court and our nation well.

Thank you.

The **Chairman**. Justice Rehnquist, this is your hearing, but you haven't had a chance to say anything yet. We now ask you to come around.

If you will stand and raise your right hand and be sworn.

[Justice Rehnquist stands and raises his right hand.]

The **Chairman**. Will the evidence you give at this hearing be the truth, the whole truth, and nothing but the truth, so help you god?

Justice **Rehnquist**. It will.

The **Chairman**. Have a seat. We won't ask any questions this afternoon, but first would you like to introduce your family who is here?

TESTIMONY OF HON. WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, TO BE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Justice **Rehnquist**. Yes, I would very much, Mr. Chairman. My wife of 33 years, Nan. My daughter, Janet. My son-in-law, Joe Lynch.

The **Chairman**. Thank you very much. Do you have any opening statement that you would care to make?

Justice **Rehnquist**. Yes, I do, Mr. Chairman. Mr. Chairman, members of the Senate Judiciary Committee, it is a great honor to have an opportunity to appear before this committee today. I am deeply grateful to the President for the confidence he manifested in me when he nominated me to be Chief Justice of the United States, and I welcome the opportunity these hearings afford the committee and the Senate to discharge their constitutional duty in the appointment process.

I want to thank Senator Dole, Senator DeConcini, Senator Warner, and Senator Trible for spending the time and effort necessary to introduce me to the Committee.

I am at the committee's disposal, Mr. Chairman.

The **Chairman**. Are there any other remarks you would like to make at this time?

Justice **Rehnquist**. No, Mr. Chairman. I understand the questioning is reserved for tomorrow.

The **Chairman**. That's correct; we will refrain from questioning you this afternoon. And, unless somebody has something else to say, we will now stand in recess.

Senator **Biden**. Mr. Chairman, I have no questions, but——

Senator **Metzenbaum**. I don't want the nominee for Chief Justice to overlook the fact that Senator Goldwater put a statement in the record.

You want to thank him, too, don't you?

Justice **Rehnquist**. Thank you, Senator Metzenbaum. Let me amend my statement to thank Senator Goldwater.

Senator **Biden**. Senator Metzenbaum would make a heck of a clerk, wouldn't he? [Laughter.]

Mr. Chairman, I have no questions for the Chief Justice, but I do think there are two things that we should settle unrelated to the Chief Justice's presence, raised by two of my colleagues, and one item raised by me, before we begin tomorrow morning so we can begin tomorrow with a clean slate right out of the box, if I may, if it's appropriate. I'd like to raise those with you now.

As far as I'm concerned, the Chief Justice can be excused—I have no questions for him.

But I do have a question for you, Mr. Chairman, and my colleagues have one also.

The **Chairman**. Well, I'm not on trial, but I'll try to answer it.

Senator **Biden**. No, no, no, it's no trial. I really think, in light of the—and I'd like to publicly thank the Chief Justice nominee for his indulgence today, and specifically for it must be notwithstanding whatever degree of confidence a nominee has in his or her ability, it's not an easy thing to go through, as the rodeo king from Wyoming has pointed out earlier today. [Laughter.]

But I hope he understands—I know he does—why the hearing was delayed, and I want to publicly thank the chairman—Ambassador and Governor and statesman extraordinaire Averell Harriman's funeral was today in New York, and many of us wished to attend.

So I appreciate the accommodation.

And in order to be able to get things off to a running start tomorrow so we can conclude this hearing as expeditiously as is reasonable, I'd like to ask a few procedural questions, Mr. Chairman. This is not a trial, it's just a matter of working it out so we don't wrangle about it tomorrow if we can settle it tonight.

First of all——

Justice **Rehnquist**. Is it my understanding that I may be excused, Mr. Chairman?

Senator **Biden**. From my standpoint, yes.

The **Chairman**. You are now excused, if you wish; he just wants to ask me a question. We are going to meet at 10 o'clock—stand in recess until 10 tomorrow—and you are now excused.

Justice **Rehnquist**. Thank you, Mr. Chairman, and members of the committee.

Senator **Metzenbaum**. We don't stand in recess yet.

Senator **Biden**. No, we don't. Mr. Chairman—I'd make a heck of a clerk to the Chairman—Mr. Chairman, there are two matters that we have to resolve, if you would, as you say, in the open, and several we have to resolve when we move off the dais here.

But the first is I would like to respectfully suggest that in order to have some continuity to the hearing tomorrow in a nomination as significant as the Chief Justice's, that rather than limiting our questions to 10 or 15 minutes, each Senator be allowed in the opening round to have a half hour of questioning with the Chief Justice, so that there is continuity, so that we know what we are asking and have an opportunity to follow up on it so it doesn't come off like a White House press conference—I don't mean President—any White House press conference.

So I would like to ask you whether the chairman would be willing to extend the questioning period for each Senator to one-half hour so we can plan our time.

The **Chairman**. Ordinarily, we allow 10 minutes to each Senator. We have 18 Senators, and that takes a long time to get around. I had in mind, tomorrow, to allow 15 minutes to the Senator. In order to compromise this situation, then, we will double the 10-

minute time and allow 20 minutes to each Senator. I think that would be fair.

Senator **Biden**. I concur with that, Mr. Chairman, and, as usual, you are always accomodating. Two of my colleagues have raised with me a question that they could better articulate than I, and I happen to agree with them on the point, but I would like to yield to Senator Metzenbaum, at this moment, if I may.

Senator **Metzenbaum**. Mr. Chairman, at the meeting we had in your office, I had indicated to you that, on behalf of Senator Simon and myself, we had wanted the Arizona and California witnesses to be present at the hearing. Duke indicated at that time, that the FBI was completing its investigation. It is now my understanding the investigation has been completed.

I have not seen that, but I understand there is a single copy of that report in Duke's office. Regardless of what the FBI has concluded, I think we are all good enough lawyers to know that the best evidence comes from the witnesses themselves, and that the right to examine the witnesses, and cross examine them, is entirely appropriate. Therefore, on behalf of Senator Simon and myself—Senator Biden joins us, and I think other Members do as well—I would like to be certain of that, so there will be no delay in these proceedings, that the chairman instruct the staff to arrange for the 12 witnesses, or whatever the exact number is, to be present at such time as the chairman designates.

The **Chairman**. I had not had a chance to review it. The report just came in at 3:30 this afternoon, but I will do it by tomorrow's meeting, and at that time I will be glad to respond. We wish to extend every privilege we can.

Senator **Metzenbaum**. Mr. Chairman, you have been very cooperative, and I do not wish to be in a position of confrontation with you, but I want to point out, that you have made it clear that if you can you would like to conclude the hearing by Friday.

I do not have any desire to delay the time of the hearings, but I want to say that these are people who are out in the countryside. They are not waiting for fall. They are not ready to drop everything they are doing. They have to make arrangements with their own families in order to travel across the country. You lose three hours in crossing the country.

And I would very strongly urge you, so that we not get into a wrangle about whether we have a hearing next week, or what we do—I would very strongly urge you, Mr. Chairman, that regardless of the FBI's report, that you instruct the staff to go to work tonight, seeing to it that arrangements are made for those witnesses to come at any time that the chairman feels is an appropriate time.

The **Chairman** Well, the staff and I will review the FBI reports tonight, and I am quite sure the matter can be handled satisfactorily.

Senator **Biden**. Mr. Chairman, if I can add——

The **Chairman**. I would not want to make any final statement until I review the report.

Senator **Biden**. Well, Mr. Chairman, during your deliberation, let me point out the following: My staff, Mr. Govan, and other staff members in the minority, have in fact spoken to—over the telephone—we know none of these witnesses—have spoken to each of them on the telephone, I believe each and every one. And I really think that, notwithstanding what the FBI report says, we all acknowledge we do not know what it says.

Notwithstanding what it says, that the committee should not be bound, one way or another, by the FBI interpretation of a witness' legitimacy or illegitimacy. That is the business of the committee.

And I would, based on the assertion of two of the investigators on this side, and I suspect maybe Mr. Short has also spoken to some, I strongly urge that the chairman move through this, as he will, expeditiously, by just suggesting that these witnesses, 99 percent of whom are new to this process, they were not—prior to the last hearing on Justice Rehnquist—that they be called, and we can judge their credibility here, notwithstanding the FBI report.

Senator SIMON. Mr. Chairman.

The CHAIRMAN. Well, that is an additional twelve witnesses. That is a good many more witnesses. Now I understand that one of those witnesses refused to be interviewed by the FBI.

Senator BIDEN. Well, I think it is appropriate, if he refuses to come, then—if they refuse to come, do not——

The CHAIRMAN. I do not mean refused to come. He just refused to be interviewed, and if he refused to be interviewed I would oppose his testifying until he does agree to an interview.

Senator BIDEN. Well——

The CHAIRMAN. The Democrats requested these interviews by the FBI.

Senator BIDEN. Well, I do not want to argue about that. Let's agree on 11 out of 12, then, and we can save the 12th for another time, to discuss.

Senator METZENBAUM. And it may be that he——

The CHAIRMAN. Well, it may be there is a lot of duplication. I am not too sure we will need that many. Maybe we can. I will try to work it out. I will give you an answer tomorrow.

Senator METZENBAUM. Mr. Chairman, I think the Senator from Illinois wishes to be heard.

Senator SIMON. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Yes. If I could just join in supporting the request of my colleagues. It does seem to me, because of the importance of this, that no question should go unanswered. If there is a possibility of something out there, we ought to know about it. I would urge the chairman to very seriously consider this request.

And frankly, I am among those who is not sure how I am going to vote yet on this nomination.

The CHAIRMAN. I am sure we could use some of those witnesses. I just wonder, if there is duplication, if we need to have 12, or even 11, and that is the reason I would like to look at the report there, and we can get together on it in a satisfactory way, I am quite sure.

Senator SIMON. Well, I would trust the judgment of the chairman, but I would urge him to seriously consider this request.

The CHAIRMAN. I understand there are about 50 names in the report there, and so I think I would have to take a look at it, but we will give you an answer in the morning.

Senator **Metzenbaum**. Well, Mr. Chairman, we want to work with you but we do not want to wait for the very last minute, and I think getting one or two would not be adequate. I think it is a question of bringing—we are not now talking as the committee's——

The **Chairman**. Well, could you agree on six, for instance, if they—in other words, in those, is there not a lot of duplication? If some of them know the facts, could they not just——

Senator **Biden**. Well, this is a matter of credibility, Mr. Chairman, and obviously, numbers relate to credibility.

Senator **Simpson**. Well, Mr. Chairman——

Senator **Biden**. If I can just finish. Maybe the way to resolve this is to let us set—let the chairman set a time when the witnesses will appear, if they are called. So, all of them are on notice, that if we conclude they should be called, they would know when they would come, so they can make their plans to come now, if we conclude to have 1, or 6, or 12, or whatever.

If the chairman would set a time now, then in fact there is no misunderstanding about when that would occur, and those witnesses, all of whom are cross country, I am told, could make tentative plans to be here, unless the committee chooses not to have them.

The **Chairman**. Well, those that will come, we could have them Thursday, say, Thursday afternoon, if that would be agreeable.

Senator **Biden**. Why not make it Friday to give them an opportunity, if we are going to——

Senator **DeConcini**. Mr. Chairman, some of those witnesses are——

The **Chairman**. How is that?

Senator **DeConcini**. Some of those witnesses are from the State of Arizona, and I have had some contact with them, and some of them are on retirement and cannot afford to come at their own expense. Others are working, practicing in their profession and jobs, and need some time. I would just like to point out to the committee that——

The **Chairman**. Well, I was hoping to finish here on Friday afternoon, but——

Senator **DeConcini** [continuing]. We have 12 or 15 witnesses here, and they need some notice. Well, why don't we make them the last——

The **Chairman**. I mean Thursday afternoon.

Senator **Biden**. I do not think that is realistic, Mr. Chairman.

The **Chairman**. Would you want to take them Thursday afternoon?

Senator **Metzenbaum**. I think Senator DeConcini is making the point that that would probably be quite an imposition on them to be able to get here at that point. Perhaps we ought to take——

Senator **Biden**. Want to make them Friday morning and——

The **Chairman**. Senator Simpson.

Senator **Simpson**. Well, Mr. Chairman, I do not know how long this exercise is going to go. The chairman has been very fair; he is going to be fair. He has not read the report. He is going to read the report and then he will deal openly with the members who are opposed to the Chief Justice nominee, as he has always done.

I see no need to, just for the exercise, you know, of the evening, to do that. He will be fair with us. These are witnesses who were all, I think, or many of them, examined in 1971, when we put the Chief Justice nominee through the hoops when he went to the Supreme Court, and here we go again. I would not want anyone to be disabused of this "mother lode" that we are digging, but that was done in 1971.

Senator **Biden**. Will the Senator yield?

Senator **Simpson**. Yes; I certainly will.

Senator **Biden**. I want to make something clear. The Senator from Wyoming and I have a tendency on occasion—each of us have similarities. We like to engage in humor. The Senator is better at it than I am. We sometimes have rhetorical flights of fancy, both of us. We have each counseled one another on that as friends.

I want to make it clear: This Senator from Delaware has not made up his mind. This is not, No. 1, a decision made by those who have concluded they are going to vote against the Chief Justice nominee. Second, the second point I would like to make, is that almost all of these witnesses are people who never were known prior to the last hearing, and third——

The **Chairman**. I think we can solve it without so much talk.

Senator **Biden**. All right.

Senator **DeConcini**. Mr. Chairman.

The **Chairman**. We will finish all witnesses Wednesday and Thursday, except Senator DeConcini says we need more time——

Senator **DeConcini**. Perhaps, Mr. Chairman. I do not know.

The **Chairman**. And we will take them Friday and get through by 1 o'clock Friday. Is that fair enough?

Senator **DeConcini**. Mr. Chairman. Would the chairman yield? I thank him for that. I just want to point out to Senator Simpson that nobody is accusing the chairman here of being unfair. I agree with——

The **Chairman**. I am aware of that.

Senator **DeConcini** [continuing]. Senator Simpson. He is fair, he has been fair, and I think will be. I just wanted to go on record here that I do not think anybody is playing any games or digging——

The **Chairman**. We will finish all witnesses, if we have to run late tomorrow night, and late the next night. We are going to finish up everything except these witnesses you are talking about, and we will not go longer than 1 o'clock Friday on them. Is that agreeable?

Senator **Biden**. Well, no, it is not agreeable, we will not go longer than 1. I do not know, Mr. Chairman. The answer is none of——

The **Chairman**. Well, we will start sooner. I can start at 8 o'clock in the morning if——

Senator **Biden**. I think that is fine. None of us want to hang around here——

The **Chairman**. Well, I am going to finish at 1 o'clock on Friday. Now, if you want to start at 7 or 8, I would be ready to do it.

Senator **Biden**. Fine.

Senator **Metzenbaum**. Mr. Chairman, let me just——

The **Chairman**. Senator Metzenbaum.

Senator METZENBAUM. Just 1 second. There is not any member on this committee that I know of that wants to unduly prolong the hearing. I attest to that myself, and I do not know anybody else who has any inclination along that line.

The chairman has worked very well with all of us. The ranking member has indicated he does not know how he is going to vote and I certainly have not indicated how I am going to vote, and I am not sure. This is the most important responsibility this committee has had this session. And so I would urge the chairman not to set arbitrary hours of 1 o'clock or 2 o'clock or 7 o'clock. We will work with you. Let's work cooperatively. Let's not work against deadlines.

The CHAIRMAN. Senator, we have had a hearing now today. We have put it off the floor to accommodate you gentlemen.

Senator METZENBAUM. You have been wonderful.

The CHAIRMAN. And then tomorrow we will have it——

Senator METZENBAUM. You will be great tomorrow.

The CHAIRMAN. And we are going to start at 10 and go late tomorrow night. And the next day we will start it and go late. And that will finish it, all except these witnesses from Arizona.

Now, out of respect for Senator DeConcini, I thought that would be time for them to get here.

Senator METZENBAUM. We will work with you, Mr. Chairman, but let's not try to get into a battle with 1 o'clock, or something.

The CHAIRMAN. Well, I have got to finish here. I have got to finish——

Senator BIDEN. Mr. Chairman, just as——

The CHAIRMAN. I planned to finish here Thursday night, but, out of respect for you with these witnesses from Arizona, we will go as late as necessary, till 1 o'clock on Friday, if it is necessary. I hope we will not have to go that line. We are now in recess until 10 a.m. tomorrow.

[Whereupon, at 7:45 p.m., the committee was recessed, to reconvene at 10 o'clock a.m., July 30, 1986.]

NOMINATION OF JUSTICE WILLIAM HUBBS REHNQUIST

WEDNESDAY, JULY 30, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:10 a.m., in room SD-106, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Biden, Mathias, Metzenbaum, Heflin, Hatch, Grassley, Simon, McConnell, Broyhill, Kennedy, Laxalt, DeConcini, Specter, Leahy, and Simpson.

Staff present: Dennis Shedd, chief counsel and staff director; Duke Short, chief investigator; Frank Klonoski, investigator; Jack Mitchell, investigator; Reginald Govan, minority investigator; Mark Gitenstein, minority chief counsel; Cindy Lebow, minority staff director; and Melinda Koutsoumpas, chief clerk.

The CHAIRMAN. The committee will come to order.

Our first witness today is Mr. Gene W. Lafitte, and Mr. John D. Lane, of the American Bar Association Standing Committee on the Judiciary. If you gentlemen would come around, please, hold up your hands and be sworn. Let us get quiet.

Senator BIDEN. Mr. Chairman, aren't we starting with Justice Rehnquist?

The CHAIRMAN. The ABA is here. I want to take them.

Will the evidence you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. LAFITTE. It will be.

Mr. LANE. It will be.

Senator METZENBAUM. Mr. Chairman, may I inquire of the procedure? I thought we were going to have an opportunity to inquire of Justice Rehnquist at this point.

The CHAIRMAN. You sure will; the rest of the day, if you want to. But the ABA people are here, and I am going to take them so we can release them.

Senator METZENBAUM. There are a lot of other people who are here as witnesses.

The CHAIRMAN. Well, you cannot have but one chairman, and that is what I have ruled. [Laughter.]

Mr. Lafitte, would you please proceed?

TESTIMONY OF GENE W. LAFITTE AND JOHN D. LANE, STANDING COMMITTEE ON FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION

Mr. LAFITTE. Thank you, Mr. Chairman, members of the committee.

My name is Gene Lafitte. I practice law in New Orleans, LA. I am a member as the Fifth Circuit Representative of the American Bar Association's Standing Committee on Federal Judiciary. With me today is John D. Lane, of Washington, DC, another member of our committee. And Mr. Chairman, Mr. Lane and I are pinch-hitters for our chairman, Robert B. Fiske, Jr., the chairman of our committee, who is involved in some litigation in New York City and regrettably was unable to be with us this morning.

The CHAIRMAN. Speak into the mike so we can hear you better.

Mr. LAFITTE. All right, sir. I was just saying, Mr. Chairman, that Mr. Lane and I are substituting this morning for Robert B. Fiske, Jr., who is chairman of our committee but could not be here because of some litigation in New York.

The CHAIRMAN. Yes.

Mr. LAFITTE. We appear here to present the views of the American Bar Association on the nomination of the honorable William H. Rehnquist, Associate Justice of the Supreme Court of the United States to be Chief Justice of the United States. At the request of the Attorney General, our committee investigated the professional competence, judicial temperament and integrity of Justice Rehnquist. Because the nominee is a sitting Justice of the Supreme Court and is being nominated for the position of Chief Justice, we were particularly interested in his administrative abilities, his leadership qualities and collegiality.

Our work included discussions with more than 300 persons, including first, all Associate Justices of the Supreme Court of the United States, and many Federal and State judges throughout the country; second, a national cross-section of practicing lawyers; third, many law school deans and faculty members, including constitutional law and Supreme Court scholars; fourth, a group of practicing lawyers who studied Justice Rehnquist's other judicial opinions; and finally, Justice Rehnquist himself, who was interviewed by three members of our committee.

Based on our investigation, the committee is unanimously of the opinion that Justice Rehnquist is entitled to the highest evaluation of the committee: well-qualified.

Under our committee guidelines, that evaluation is reserved for those who meet the highest standards of professional competence, judicial temperament, and integrity. It is reserved for those persons who are among the best available for appointment.

I have filed with this committee a letter describing the results of our investigation and shall not repeat its content in detail here, Mr. Chairman. I do request that that letter be included in the record of these proceedings.

The CHAIRMAN. It will be made part of the committee record.

[Document follows:]

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July 29, 1986

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to the invitation to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to submit its opinion regarding the nomination of the Honorable William Hubbs Rehnquist of Washington, D.C. to be Chief Justice of the United States.

The Committee's investigation of Justice Rehnquist covered his professional competence, judicial temperament and integrity. Because the nominee is a sitting Justice of the Supreme Court and is being nominated for the position of Chief Justice, we were particularly interested in his administrative abilities, leadership qualities and collegiality. Consistent with its long standing tradition, the Committee has not concerned itself with Justice Rehnquist's general political ideology or his views on issues except to the extent that such matters might bear on judicial temperament and integrity.

The Committee's investigation of Justice Rehnquist included the following inquiries:

(1) Members of the Committee interviewed all of the Associate Justices of the Supreme Court and a large number of other federal and state judges throughout the United States.

(2) Committee members interviewed a cross section of practicing lawyers throughout the United States.

STANDING COMMITTEE ON FEDERAL JUDICIARY
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(3) Committee members interviewed many deans and faculty members of law schools throughout the country, including a number of constitutional and Supreme Court scholars.

(4) A group of practicing attorneys reviewed approximately 200 of the written opinions authored by Justice Rehnquist.

(5) Three members of the Committee interviewed Justice Rehnquist.

Professional Background

Justice Rehnquist's career has included service as a practicing lawyer, an Assistant Attorney General with the United States Department of Justice, and as an Associate Justice of the United States Supreme Court. He received A.B. and M.A. degrees from Stanford University in 1948, an M.A. degree from Harvard University in 1949, and an LL.B. from Stanford Law School in 1952. He was a distinguished student in the law school, ranking first in his class. His military experience includes service as a non-commissioned officer in the U.S. Army Air Force during the period from 1943 to 1946.

Justice Rehnquist served as a law clerk to Associate Justice Robert H. Jackson of the Supreme Court of the United States from 1952 to 1953. He then commenced the private practice of law in Phoenix, Arizona. From 1953 to 1955 he was an associate in the firm of Evans, Kitchel & Jencks. During 1956 and 1957 he was a partner in the firm of Ragan & Rehnquist and from 1957 to 1960 he was a partner in the firm of Cunningham, Carson & Messenger. In 1960 he formed with James Powers the Phoenix firm of Powers & Rehnquist, where he practiced until 1969. From 1969 to 1971 he was an Assistant Attorney General, Office of Legal Counsel, United States Department of Justice in Washington, D.C. In 1971 he was nominated by President Nixon as Associate Justice of the United States Supreme Court, and this nomination was confirmed by the Senate in that year.

Through interviews of those who worked with Justice Rehnquist during various stages of his professional career, both prior and subsequent to his appointment to the United States Supreme Court, the Committee learned that he has demonstrated a high degree of competence and integrity, and has displayed excellent judicial temperament.

Interviews with Judges

In its investigation, the Committee interviewed over 300 persons, including all of the current Associate Justices of the Supreme Court, and more than 180 federal and state judges. Members of the judiciary who know him describe him as "a true scholar, collegial, genial and low key," "unbelievably brilliant," "a very capable individual in every respect". Generally, judges across the country who have become familiar with Justice Rehnquist have expressed admiration and respect for him as an able, hard working, conscientious individual. On the whole, the judicial community was high in its praise of Justice Rehnquist's abilities and qualifications. Of great importance, he enjoys the respect and esteem of his colleagues on the Court.

Interviews with Lawyers

The Committee contacted approximately 65 practicing lawyers throughout the United States. We interviewed a cross section of the legal community, including women and minority lawyers. Many who know Justice Rehnquist, including many who disagree with him politically and philosophically, speak of warm admiration for him and describe him as "very talented," "a bright and able man," "always well prepared," and one who "brings out the best in people and will facilitate the work of the Court."

Interviews with Deans and Professors of Law

The Committee spoke to more than 50 deans and faculty members of a number of law schools throughout the country. Some of these have known Justice Rehnquist personally. We found that he has visited and delivered speeches at several of the law schools. Many of these individuals spoke highly of his writing and analytical ability. The vast majority had strong praise for his professional qualifications.

Survey of Justice Rehnquist's Opinions

Approximately 200 of Justice Rehnquist's opinions were examined for the Committee by a group of practicing attorneys. From that review it can be concluded that the Justice's legal analysis and writing ability are of the highest quality.

Interview with Justice Rehnquist

Justice Rehnquist was interviewed by three members of the Committee. The Committee members have found him to be extremely intelligent, articulate, friendly, and committed to the fair and proper administration of justice. He has demonstrated outstanding qualities as a jurist, and is approaching the position of Chief Justice with enthusiasm, determination and dedication.

Based on the investigation described above, the Committee unanimously has found that Justice Rehnquist meets the highest standards of professional competence, judicial temperament and integrity, is among the best available for appointment as Chief Justice of the United States, and is entitled to the Committee's highest evaluation of the nominees to the Supreme Court -- Well Qualified.

This report is being filed at the commencement of the Senate Judiciary Committee's hearing. We will review our report at the conclusion of the hearings, and notify you if any circumstances have developed that may require modification of our views.

Respectfully submitted,

ROBERT B. FISKE, JR.
Chairman

Mr. **Lafitte**. To summarize our findings, our investigation revealed that Justice Rehnquist is extremely intelligent, analytical, conscientious, and hardworking. He had an outstanding academic record, and our committee members heard strong praise for his leadership qualities, his intellect and his ability as a practicing lawyer and as a lawyer in Government service.

As an Associate Justice of the Supreme Court, he is held in high esteem by his colleagues on the Court for his scholarship and congeniality. The diversity of his experience as a practicing lawyer and as a Supreme Court Justice provides a valuable background for service as Chief Justice of the United States.

He has strong administrative abilities and a judicial temperament appropriate to serve in that position. His judgment is sound, and his integrity is above reproach.

In conclusion, Mr. Chairman, the committee has unanimously found that Justice Rehnquist is entitled to its highest evaluation of a nominee for the position of Chief Justice of the United States.

Thank you very much, Senator Thurmond and members of the committee.

That concludes our statement.

The **Chairman**. Is the rating you have given Justice Rehnquist the highest rating the American Bar Association gives?

Mr. **Lafitte**. It is, Senator.

The **Chairman**. It is the highest rating.

Mr. **Lafitte**. For the position of Supreme Court Justice; correct.

The **Chairman**. Mr. Lane, do you wish to add anything further?

Mr. **Lane**. No, Mr. Chairman. I think the statement of Mr. Lafitte accurately and completely states the position of our committee, which he noted was by unanimous vote after the telephone conference call meeting that lasted for a rather lengthy period.

I was also one of those privileged to have the opportunity to interview Justice Rehnquist, and for what it is worth, I concur fully in these findings and report.

The **Chairman**. The able Senator from Delaware.

Senator **Biden**. Thank you, Mr. Chairman.

Notwithstanding the fact, gentlemen, that I did not expect to see you for another 5, 6 hours, it is nice to have you here. Mr. Lane, I know you are in town, so you could always come back; it is just up the street.

We are not inconveniencing you, are we?

Mr. **Lane**. Not at all.

Senator **Biden**. Good. OK.

Mr. **Lane**. We were ready yesterday, also.

Senator **Biden**. Good. And you would be ready tomorrow, I am sure. [Laughter.]

Let me ask you a few questions, even though I had quite frankly not concentrated on this, because I did not think we were going to get to it. But let me ask a few questions, gentlemen.

No. 1, did you interview other Associate Justices?

Mr. **Lafitte**. We interviewed all of them, Senator Biden, on the Supreme Court.

Senator **Biden**. Did the Associate Justices indicate whether or not—you said they said Justice Rehnquist is "collegial"; is that the phrase you used?

Mr. **Lafitte**. Correct, Senator. And the word "congenial" was also used.

Senator **Biden**. "Congenial".

Mr. **Lafitte**. Yes.

Senator **Biden**. And did they speak to the degree to which he participates in conferences and preconferences to discuss opinions that he has written before he writes them?

Mr. **Lafitte**. I think that it might be well for Mr. Lane, who did that investigation, to respond to you. I can report to you that all of the Justices spoke very highly of Associate Justice Rehnquist's qualities as a collegial member of the Court; spoke highly of his intellect, of his work habits, and hold him in high esteem, very obviously.

But John may want to amplify.

Senator **Biden**. Mr. Lane, did you interview each of the Associate Justices?

Mr. **Lane**. Yes, Senator Biden, I did. I found almost virtual unanimous support for this among his colleagues, which was something that was very persuasive with me.

Senator **Biden**. Well, it is persuasive with me, also.

Mr. **Lane**. I started with the most senior member of the Court and proceeded on down.

Senator **Biden**. In light of the time commitment here, let me ask my question precisely, if I could, and maybe you could speak to the precise question.

Was there discussion with the Associate Justices with whom you spoke and the Chief, whom I assume you spoke to, also, was there discussion about the work habits of Justice Rehnquist as it relates to his inclination to discuss cases that had been heard prior to the writing of opinions.

As you know, there is a custom on occasion in the Court where Justices discuss at conference or preconference with one another a case; then, they go back to their chambers and they write their opinions on many occasions. Sometimes, it does not happen that way.

Did you get any indication as to what extent Justice Rehnquist, relative to other Justices, participated in conferences prior to having written his final decision?

Mr. **Lane**. Yes. I think that subject matter generally ran through most of the interviews. And the picture that I gathered was that Justice Rehnquist, having been originally the ninth in seniority, moving from nine to eight and finally to seven, was never one of those who would be called upon first in conference to present his views of the matter. So I believe there were many cases that were fairly well discussed by the time it came to his turn.

However, I did gather in these discussions, and I had the picture of a man who was open to his associates' and his colleagues' views; was always open and available and willing to discuss these matters.

I was reminded that these cases, do not get to the Supreme Court unless they involve tough issues. And many of them have at least two and sometimes three respectable positions. And so merely the fact that one may disagree over there in the Court on a final result does not detract in any way from the deliberative process, and the collegiality that apparently exists——

Senator **Biden**. I appreciate your editorial comment, and I happen to agree with it; I think it is a fine editorial statement. I am trying to find out what——

Mr. **Lane**. Well, I am really not trying to editorialize. I am trying to give you the picture that I gained in my own mind as I went through this process.

The **Chairman**. Yes. Go ahead. You are allowed to finish your statement. Go ahead.

Mr. **Lane**. I was pleasantly surprised at the results of this effort. There was genuine enthusiasm on the part of not only his colleagues on the Court, but others who served the Court in a staff capacity and some of the relatively lowly paid individuals at the Court. There was almost a unanimous feeling of joy, that I was not only surprised at, but found a very welcome fact.

Senator **Biden**. So the occasional press reports that Justice Rehnquist, because of his intellectual brilliance and his hard work, usually hears a case, departs from the bench, goes back to his office—the reputation that he has, at least in the press, is he is the first one to have his opinions finished, and that—first of all, did you find that to be true, that he is the first one, usually, that he has that reputation?

Mr. **Lane**. I found that he has a reputation of pushing his work under tight deadlines. He apparently gives his law clerks 10 days to get a draft out, and if they do not get it, he comes and takes it out of the typewriter and he will finish it himself.

To us lawyers who wait and wait and wait for courts to decide cases, this is a healthy development.

Senator **Biden**. I think it is healthy to get people to work hard, too. But what I am trying to get at is whether or not you get a picture of the Justice. The picture that has been painted in the past is that he is extremely bright, extremely honest, has a great sense of humor. I have even heard anecdotes about him hiring someone to do cardboard cutouts of the Chief Justice and then calling the Chief Justice to say his car is broken down and can he get a ride in with the Chief Justice, and then riding by, this fellow standing there with a—which is my kind of guy in that; I would like to have a cardboard cutout of some—but seriously, that he is very well loved, that he is very well liked.

But what I am trying to get at are his work habits. And my understanding is he is very, very precise and very, very thorough, and he moves very rapidly. But the other side of that, I am told, is that he in fact does not do what other Justices do as a habit, which is in addition to giving his clerk 10 days, that he does not sit and commiserate with the other judges about what do they think they should be doing, how are they going to write their opinion, what are they going to do about it. And he goes in and bangs out his opinion based on thorough thought, what he thinks should be the result, and delivers it, and comes to conference ready; he has already made up his mind as to which way he wants to go.

Is that the picture, or is that an inaccurate picture?

Mr. **Lane**. That is not quite the picture that I gained from all of the information that was given me.

Senator **Biden**. Why don't you tell me how the picture you gave is different than what I just suggested.

Mr. Lane. I talked to law clerks, clerks that are there now; I talked to clerks who clerked when he was also a clerk in the Court, who are now very prominent lawyers and one of them, a very prominent Federal judge.

You begin to get a view of the person in his earlier years in training. He was affable, one who was friendly, one who was always accessible, and one who was universally admired—even though two of these lawyers who clerked at the same time, both of them for the Chief Justice at the time, Chief Justice Vinson, are well-known liberal Democrats——

Senator Biden. Oh, I agree.

Mr. Lane [continuing]. Who disagree with him politically and philosophically——

Senator Biden. Mr. Lane, let me——

The **Chairman.** Just a minute, Senator. Let him finish his statement.

Mr. Lane. But they have the highest regard for him as a lawyer and as a person.

Now, as I proceeded further, I talked to a former clerk of the Supreme Court, a man who I have known for many years and have a high respect for, and he described how Justice Rehuquist is well-liked by the Court personnel, how they respect him, and how he gets the work done. Justice Rehnquist, being responsible for the ninth circuit, has probably more traffic with the clerks' office than the other Justices, because there are so many petitions that require his scrutiny and a decision. The clerks say that his work is done promptly, and his instructions to the clerk are clear and precise; they do not have to guess and go back for further instructions.

So these are the kinds of things we were looking for to see what kind of an administrator, what kind of a Chief Justice we would have in Justice Rehnquist.

To go on further, if I may, when talking to his colleagues about how they felt toward him, he is regarded as a close personal friend of men who are diametrically opposed to him philosophically and politically.

Senator Biden. Senator Thurmond and I understand that.

Mr. Lane. That is right. Well, I worked here years ago, so I understand the Senate, too.

The **Chairman.** Do you have any more questions?

Senator Biden. Do you want to say any more?

Mr. Lane. Not unless you have further questions.

Senator Biden. I do.

There is no question about the Justice being accessible. Does he seek access? That is my question; that is all I am trying to get at. Is he one of the Justices who seeks the opinion of other Justices prior to reaching his decision? There is no question he is accessible. The question is does he seek access?

Mr. Lane. I am afraid I cannot answer that question with any degree of precision. However, I think that he is one who listens. It was clear to me that he is one who listens to others, and being a rather junior member of the Court, he has to listen when these cases are discussed in the conference of the Court.

Mr. Lafitte. I believe we did get a report, Senator Biden, if I might supplement Mr. Lane's remarks——

Senator **Biden**. Certainly.

Mr. **Lafitte** [continuing]. That Justice Rehnquist is a Justice who will go down the hall and go to the chambers of another Justice and discuss matters. I do not have any sense that we know the particulars of the way he operates that you are inquiring about now, but I think our committee felt a clear sense, because of the emphasis on the collegial relationship that he enjoys with the other Justices, the way they have expressed sincere admiration for his work on the Court as a collegial member of it, that that carries with it a strong sense of participation. As people have put it, the Court members can be thought of as nine separate law firms, and so I guess they have to operate that way in a certain sense.

Senator **Biden**. Thank you, Mr. Chairman, and thank you, gentlemen, for your time.

The **Chairman**. The distinguished Senator from Maryland.

Senator **Mathias**. Thank you, Mr. Chairman.

Mr. Lane, you have been here several times.

Mr. **Lane**. Several.

Senator **Mathias**. I understand this is probably one of your last visits with the committee in this role.

Mr. **Lane**. I imagine that is probably true—unless I will be back on Judge Scalia.

Senator **Mathias**. I will take this opportunity to express my thanks to you for the years in which you have performed this important and rather thankless public service. It is not an easy job, and can be at times troubling. Nonetheless, you have done it with great distinction. The committee in particular, and the public in general, owe you a debt of gratitude.

Mr. **Lane**. I thank the Senator from Maryland.

Senator **Mathias**. Did your review of the qualifications of Justice Rehnquist include a review of his judicial opinions?

Mr. **Lane**. That is correct, Senator.

Mr. **Lafitte**. By practicing attorneys, by practicing lawyers.

Senator **Mathias**. I am curious as to what you look for in that review of opinions. Are you looking at his style or form, or the substance?

Mr. **Lafitte**. Yes, sir. We look for analytical ability, the ability to take apart and put back together complex legal issues; clarity of style; organization—that type thing—anything—as the Senator knows, we are not concerned with political ideology and philosophy of that nature, except to the extent that it bears on temperament or integrity.

Senator **Mathias**. Now, you mentioned philosophy and ideology. That raises a sensitive question for this committee, and I would be curious as to your advice. To what extent can a committee inquire into, devote its attention to, and rest its opinion on judicial decisions of a nominee without impinging on the very important principle of independent administration of justice? Can we ask a judge to account for his judicial opinions in a proceeding of this sort?

Mr. **Lafitte**. Well, as I say, Senator Mathias, I suppose the main purpose of our review of the opinions is to see what kind of writing style the nominee has and then——

Senator **Mathias**. I understand that, and I think you expressed that very well. I am asking for your further advice.

Mr. LAFITTE. Well, we found nothing in his opinions that would indicate any problem of—at least, the reports received by us—indicate any problem of temperament or integrity. Now, we discussed with Justice Rehnquist comments that we had received about his stands and decisions on issues generally, but I do not relate that particularly to his writings, his judicial opinions.

Senator MATHIAS. I understand that. But how far can we go in looking at opinions without invading the province of judicial independence? How far can we go without having a chilling effect on every sitting Federal judge in the country who might someday be nominated for a different court?

Mr. LAFITTE. I am sorry. I do not think I understood your question until then. But I am not sure that I am able to advise you in that, Senator. As Mr. Lane has said, the issues that come before the Supreme Court are generally quite complex, as you have seen in the media. There often are certainly more than two positions that can be taken with respect to them. So that I do not know to what degree one can disagree with a decision, or the way an opinion is written, without impinging on judicial independence at all.

It is not an issue, though, that I think we address as a committee.

Senator MATHIAS. Mr. Lane, do you have any comment on that?

Mr. LANE. Well, I think that is why Federal judges are appointed for life, so they will not be hauled up and have to run for reelection or satisfy a certain body public in order to win reappointment. And that is why, in our statement today, we are focusing in on the fact that the Justice is a sitting Justice of the Supreme Court; he is there for life—he is going to be there anyway. And all we are dealing with is whether or not he should ascend to the traditional role as the Chief Justice of the United States.

I do not think you can take a judge and dissect his opinions and hold him in account for the way he may or may not have voted on any particular issue. Once the Court has decided, that is the supreme law of the land, and unless under the Constitution, you and the Congress can change that result, that result remains. We have to respect that.

Senator MATHIAS. Thank you very much, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Thank you very much.

I, too, want to express appreciation to Mr. Lane for the work that he has done over a long period of time to try and insure the basic integrity of the courts. We are glad to have you back here.

As I understand from the various news reports, you were recently denied reappointment to the ABA Committee on the Federal Judiciary, although you sought reappointment; is that correct?

Mr. LANE. Senator, it is not the kind of position that one campaigns for, and I did not do anything to further my chances for reappointment. I say that in all honesty.

However, I was informed that another individual would be appointed, and that is about the sum and substance of it.

Senator KENNEDY. I suppose you are aware of the news reports in the Washington Post and others that indicate that you were dropped from the panel for challenging some of the administration's nominees. Al Kamen in a recent Washington Post story said, "ABA sources said Lane angered some conservatives because he is too aggressive in questioning the qualifications of some prospective candidates."

Mr. **Lane**. Yes, I am aware of that article.

Senator **Kennedy**. Do you have any reaction to it? Let us see if he wants to complete the answer to this one, Mr. Chairman. [Laughter.]

Mr. **Lane**. Well, I guess if pressed, I would have to deny that I was too vigorous or too tough in my examination. I tried to be fair to all potential nominees. And I would also say that politics and ideology is something that did not get involved in my investigation. I could not care less what——

Mr. **Lafitte**. Senator, maybe I ought to——

Senator **Kennedy**. Well, if I could just finish this question.

Mr. **Lane**. In my investigations, I really could not care less how a person votes or how he feels on issues. I want a person that is honest, that has good experience and training in the law, and one that has a good disposition and judicial temperament. If you are going to put them on for life, you want to be reasonably sure that they are going to be able to do the job and do it well.

Senator **Kennedy**. Well, do you think ideology or political philosophy had anything to do in dropping you from the judicial panel?

Mr. **Lane**. I really cannot comment on that. I would hope not.

Senator **Kennedy**. No further questions.

The **Chairman**. The distinguished Senator from Nevada.

Senator **Laxalt**. In the interest of time, Mr. Chairman, I will yield my time to the distinguished Senator from Utah, Senator Hatch.

The **Chairman**. The distinguished Senator from Utah.

Senator **Hatch**. Thank you, Mr. Chairman.

Mr. Lafitte, is it correct that "well-qualified," as you have stated, is the highest possible rating a Supreme Court Justice can have?

Mr. **Lafitte**. That is correct, Senator.

Senator **Hatch**. Can you tell us how many deans, law professors, and scholars you interviewed in reaching your opinion here?

Mr. **Lafitte**. Over 50, as I recall, Senator.

Senator **Hatch**. Over 50?

Mr. **Lafitte**. Over 50.

Senator **Hatch**. OK. Now, to what degree——

Mr. **Lafitte**. Deans and law professors.

Senator **Hatch**. Deans and law professors. You have indicated you have reviewed his written opinions. Could you tell us approximately how many written opinions you reviewed?

Mr. **Lafitte**. Over 200.

Senator **Hatch**. Over 200?

Mr. **Lafitte**. Yes, sir.

Senator **Hach**. Now, based on 200 opinions, which would seem to me to be a rather exhaustive study, you found him to be well-qualified?

Mr. **Lafitte**. That is a factor we took into consideration in our evaluation.

Senator **Hatch**. Thank you. How many State court judges did you interview?

Mr. LAFITTE. I do not have a count on that, Senator. We interviewed over 180 Federal and State judges.

Senator HATCH. You interviewed over 180 Federal and State judges?

Mr. LAFITTE. Correct.

Senator HATCH. 180?

Mr. LAFITTE. Correct, sir, across the country.

Senator HATCH. Were any of these on State supreme courts?

Mr. LAFITTE. Yes, sir.

Senator HATCH. Quite a few?

Mr. LAFITTE. Yes, sir. We tried to contact and speak with those who were available.

Senator HATCH. So you interviewed some of the most eminent State supreme court judges with regard to this nominee as well?

Mr. LAFITTE. That is correct, along with the Federal judges.

Senator HATCH. How many States did you go into to interview various justices and judges, State judges?

Mr. LAFITTE. Well, I think all, Senator. We went about this by each of us working in our own circuits, so that we all contacted people in the States and our circuits.

Senator HATCH. Well, we understand that. But how many States did you cover?

Mr. LAFITTE. Well, I am not sure about Alaska, but I think virtually all of the States were covered.

Senator HATCH. Virtually all 50 States?

Mr. LAFITTE. Yes, yes.

Senator HATCH. So you virtually have opinions from the State justices and judges from all 50 States.

Mr. LAFITTE. They were included in our contacts, yes.

Senator HATCH. And quite a number of justices and judges.

I might add that that is a pretty strong national cross section of judges who have commended him, would you say?

Mr. LAFITTE. I would, Your Honor—force of habit, Senator—yes, I would.

Senator HATCH. How many lawyers did you interview with regard to Justice Rehnquist?

Mr. LAFITTE. I think approximately 70.

Senator HATCH. Seventy lawyers. From how many States?

Mr. LAFITTE. Well, again, this would be a cross section of the country, each——

Senator HATCH. So virtually all 50 States?

Mr. LAFITTE. That is right.

Senator HATCH. You may have missed one or two.

Mr. LAFITTE. That is right. And again, we had the problem of reaching, of making contacts, and I did not look at that.

Senator HATCH. Well, it seems to me that you made an exhaustive study; it was a nationwide study; it involved the highest scholars in the land, the most eminent jurists in the land; 180 judges, 70 lawyers, 50 law deans and professors, and in addition to that, Mr. Lane, his colleagues on the Supreme Court; is that right?

Mr. LANE. Yes.

Mr. LAFITTE. Correct.

Senator Hatch. And then you came out and recommended to this committee the highest possible rating anybody can have for Chief Justice of the U.S. Supreme Court; is that right?

Mr. Lafitte. Correct.

Senator Hatch. In fact, I do not think you could have said it any better than you did in your letter to Senator Thurmond when you said, "Based on the investigation described above, the committee unanimously has found that Justice Rehnquist meets the highest standards of professional competence, judicial temperament and integrity, is among the best available for appointment as Chief Justice of the United States, and is entitled to the committee's highest evaluation of the nominees to the Supreme Court: well-qualified."

Did I read that accurately?

Mr. Lafitte. That is correct, sir. That was the unanimous vote of our committee.

Senator Hatch. Well, I want you to know that I think a lot of us will agree with you.

Thank you, sir. We appreciate the work that both of you have done.

Mr. Lane?

Mr. Lane. I might add that we tried to reach lawyers who practiced before the Supreme Court.

Senator Hatch. Surely.

Mr. Lane. And I personally tried to reach lawyers who had lost cases in the Court.

Senator Hatch. And did you reach some of them?

Mr. Lane. I did, and I found very strong support for Justice Rehnquist, notwithstanding the results of particular cases.

Senator Hatch. Well, I think there is strong support across the country, and I hope that some of these terms like "extremist," in quote, I hope they go by the boards, and we talk about the record, and let us judge the man as all of these eminent people including yourselves have done so, who sat there for 15 solid years, and who has been considered the leading intellect on the Court, a consensus-builder, collegial, intelligent, warm, witty, decent man.

It seems to me that is what he ought to be judged on, and what we ought to be looking into here is not 30, 40 years ago, allegations that were considered back in 1971, 15 years ago, but we ought to be looking into fitness to be Chief Justice of the U.S. Supreme Court, and I think it is fair to say, Mr. Lafitte, that you have found, you and your committee and those who have investigated virtually every State in the Union in this exhaustive investigation, have found him to be the most fit.

Mr. Lafitte. That is correct, Senator. We found him to be among the best available.

Senator Hatch. Well, thank you so much. I really appreciate the efforts you have put forth.

Mr. Lafitte. Thank you.

The Chairman. The distinguished Senator from Ohio.

Senator Metzenbaum. Thank you, Mr. Chairman.

Gentlemen, I want to express my appreciation for your dedication to the legal profession and your concern about the quality of members of the judiciary. I am very pleased to welcome you here.

In your inquiry, did you give any attention to the position of the National Bar Association, the Federation of Women Lawyers, the National Conference of Black Lawyers? Did you inquire of any of those other organizations—and there are some others as well—as to the position that they have concerning the confirmation of Justice Rehnquist?

Mr. **Lafitte**. Senator, we did. I do not know whether it is appropriate for me to identify the particular organizations, but we did make contact with organizations that do represent minorities and women's interests. We spoke also with practicing lawyers and judges that are minorities and women.

The answer to your question about organizations is yes.

Senator **Metzenbaum**. And what did you find, Mr. Lafitte?

Mr. **Lafitte**. I suppose it is a mixed bag, Senator. We found some negative comment, mixed with comment that Justice Rehnquist is a very competent jurist. I think the negative comment, it would be fair to say, had to do with his conservative philosophy and whether he was in step with civil rights interests, and whether or not he would have a sufficiently open mind as a Chief Justice.

Senator **Metzenbaum**. Is it your understanding, at least it is my understanding, that those organizations will testify here? I am not directly informed as to what their position will be, but I believe they will testify in opposition to the confirmation. Is that your understanding?

Mr. **Lafitte**. Senator, I think I saw yesterday that some of these organizations will be testifying here. I also do recall that we were advised, we were given certain comments upon our contact with the advice that further investigation might be done with them and that they would be back in further touch with us if they had additional comment to make. And our report is based upon any additional comment that we received.

Senator **Metzenbaum**. But there were some concerns expressed by these other organizations, by blacks and women. Yet I noticed in the report that you sent to the committee that you make no mention of that whatsoever. Would that not have been appropriate to include the concerns that have been expressed by the other bar associations in the country?

Mr. **Lafitte**. Well, I think our letter does make reference to our contact with minority and women lawyers. Maybe stylistically, Senator Metzenbaum, we might have said something differently, but I suppose our feeling is that that covers the inquiry you are making.

Senator **Metzenbaum**. Well, I guess my point is that you do not indicate anywhere in the letter this is stylistic. I do not see that you mention anywhere in the letter that. You say, "We interviewed a cross-section of the legal community, including women and minority lawyers, many who know Justice Rehnquist, including many who disagree with him politically and philosophically, speak of warm admiration for him and describe him as very talented, a bright and able man, always well prepared, and one who brings out the best in people and will facilitate the work of the Court," end of paragraph.

You do not mention there that there were concerns expressed by black lawyers' groups, women's lawyers' groups, that they had reservations, that they were apprehensive about the appointment. And I do not know whether at that point they indicated that they were going to testify in opposition to his confirmation, but none of that found its way into your four-page letter, all of which I find to be only on the very positive side and supportive.

I am not saying that you should not be positive or supportive, except that if your investigation was as thorough as you indicate it to be, then it seems to me that it would have been appropriate for you to indicate that there were some problems expressed by certain other bar associations.

Mr. Lafitte. Well, I think that it is true that some of the organizations certainly had not expressed negative comment to us along the lines that you and I are now discussing. In fact, our first knowledge of some of those positions came after our investigation was completed and our report was made, not in that letter. But at least that letter reports on comments that we were receiving as a committee during our investigation.

When I speak of negative comment, I am speaking more of comments received from individuals who are minority and women lawyers, and those are things that we discussed with Justice Rehnquist when we interviewed him.

Senator Metzenbaum. But it is not mentioned in the letter.

Mr. Lafitte. Not mentioned in the letter.

Senator Metzenbaum. Not mentioned in the letter.

Mr. Lafitte. That is right, sir.

Senator Metzenbaum. I thank you very much.

Mr. Chairman, I want to just repeat, and I want to say it very respectfully because I have tremendous respect for you. I work very well with you and have no question about your fairness.

But I think putting the ABA on at this point out of order, when we have not had an opportunity—and also Griffin Bell—provides a kind of positive emphasis for the confirmation process that I do not know provides the sense of balance that this Senator feels is the appropriate one. And without wishing to engage in confrontation with you, I do want to express my reservations and concern as to whether this is really fair to let only the affirmative witnesses and those who are very supportive be heard out of order.

The Chairman. We are going to hear all sides, and you have got a lot of witnesses the other way. I am sure you will enjoy hearing them, and they will come later.

Senator Metzenbaum. Well, I do not have them, Mr. Chairman.

The Chairman. The able Senator from Iowa.

Senator Metzenbaum. Mr. Chairman, I want to make it clear. I do not have any witnesses against or for, nor does this Senator have a position. I just think that we are all concerned about fairness and impartiality.

Senator Hatch. I think it is a pretty balanced report.

The Chairman. The able Senator from Iowa.

Senator Grassley. Thank you, Mr. Chairman.

Mr. Lane, you know, there are a few perceptions that have been given that Justice Rehnquist is an extremist. Now, despite these statements, is it true from your investigation that none of the other members of the Supreme Court held that view and that, in fact, they believe that Justice Rehnquist contributes greatly to the deliberative process of the Court?

Mr. LANE. The best way I can answer that question, and I am not sure I can answer it directly, is that there is no doubt that Justice Rehnquist is a strong conservative and has conservative viewpoints on issues.

I never heard the word extremist. I cannot use that in the context of my answer.

Senator GRASSLEY. No. My alluding to that was based upon members of this committee as well as people in the public at large making those statements.

Mr. LANE. He is widely recognized as a strong conservative, but I have the feeling that that is not held against him. His strong views do not——

Senator GRASSLEY. Does he contribute to the deliberative process?

Mr. LANE. I think it is obvious that he does, and I think he brings something to bear on issues that others obviously must feel has some value; otherwise, they would not hold him in the high regard that they do.

Senator GRASSLEY. OK. Well, is it your view, then, that Justice Rehnquist's judicial philosophy has no negative effect on his temperament or integrity?

Mr. LANE. I think that is not only my view but was the conclusion of our committee after some consideration of that matter.

Senator GRASSLEY. Mr. Chairman, that is all the questions I have.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Mr. Chairman, thank you.

Mr. Lane, you mentioned, I think to the Senator from Utah, that you had talked to a number of lawyers, I believe it was 70; is that correct?

Mr. LANE. Approximately.

Senator DECONCINI. Some of these were from Arizona?

Mr. LANE. Yes.

Senator DECONCINI. And were some of them former partners and legal associates of the nominee?

Mr. LANE. Some of those were included, Senator. I am not sure of the number, but there were some.

Senator DECONCINI. Some of them had had actual experience in the practice of law with the nominee before he was a judge?

Mr. LAFITTE. That is correct.

Mr. LANE. And I remember talking to one.

Senator DECONCINI. And any of his partners or associates in his law firms that he was involved in?

Mr. LANE. I believe that is correct.

Senator DECONCINI. And what did you find?

Mr. LANE. I found each of them gave him high marks.

Senator DECONCINI. High marks as a lawyer and——

Mr. LANE. As an outstanding lawyer. One individual who practiced law in another firm at the same time, in Phoenix, said he was the star of the bar and rose rapidly

Senator DECONCINI. Thank you, Mr. Lane. In the course of talking to lawyers who had appeared before the Supreme Court, and even some who had lost cases there, did that include any civil rights attorneys that handled civil rights cases? Mr. Lafitte, do you recall?

Mr. **Lafitte**. Yes, I am sure it did, Senator. I do not have a—I know it did. I am just trying to recall some of the comments.

Senator **DeConcini**. Can you recall any of them? Were there some negative comments by any of those lawyers who had appeared before the Supreme Court?

Mr. **Lafitte**. I think it is fair to say that there was negative comment by some who felt that, again, his conservative philosophy was obviously a problem, a strong concern to the individual. But I cannot say that that was a uniform reaction among them.

Senator **DeConcini**. Was there some positive comment?

Mr. **Lafitte**. Oh, absolutely.

Senator **DeConcini**. From such civil rights lawyers?

Mr. **Lafitte**. Well, there certainly was strong positive comment from, I would say, the great majority of lawyers who had actually appeared before him. I do not know that I have a clear recall that they were civil rights lawyers.

Senator **DeConcini**. Were there any civil rights lawyers that you recall who said that he was not competent or capable as a lawyer and a judge?

Mr. **Lafitte**. I do not recall any comment at all to that effect.

Senator **DeConcini**. You do not recall any of that. So if it was a disagreement, it was how he happened to decide or vote on the decision, rather than his professional capability and competence?

Mr. **Lafitte**. Correct.

Senator **DeConcini**. Is that fair?

Mr. **Lafitte**. Correct, and I think most people were straightforward in saying that that was the problem.

Senator **DeConcini**. So from what you have testified here, it seems to me quite clear that you did do a thorough investigation, and what you found is what we have known for some time; there is some disagreement with the Justice's former opinions and how he happened to rule on certain cases. But there is little or no evidence of any lack of professional competence and capabilities, both as a sitting judge or to keep him from serving as the Chief Justice. Is that a fair observation of what your letter and process has done?

Mr. **Lane**. Those lawyers that appeared before him almost unanimously advised that he was always well prepared; he was very much interested in the case, and that oral argument before him was an intellectual exercise that they enjoyed.

Senator **DeConcini**. And even some of those lawyers also said that they happened to disagree with him in his decisions.

Mr. **Lane**. That is right, and some of those lost their cases, but still they had high praise for the Justice.

Senator **DeConcini**. They certainly were not too happy with the results, but they had no criticism of his capabilities or competence; is that right?

Mr. **Lane**. That is right.

Senator **DeConcini**. Thank you, Mr. Chairman.

The **Chairman**. Thank you very much.

The distinguished Senator from Pennsylvania.

Senator **Specter**. Thank you, Mr. Chairman.

At the outset, Mr. Lafitte and Mr. Lane, I join in expressing appreciation to the American Bar Association. I would add that I believe obviously, that, this committee has to make its own judgments. There has been a fair amount of discussion as to whether overly great weight is being ascribed to the American Bar Association's conclusions on other nominees who have come before this panel.

And while I start with appreciation for your work, I think it appropriate to say that I really believe we have to take our own independent view. The ABA's views, while entitled to some weight, have to be taken with the views of many, many others as well.

Mr. LAFITTE. Senator, may I say that we certainly understand that, and it has always been our perception of how you must proceed. We just want to be of service.

Senator SPECTER. Speaking for myself, I had raised a question in some of the prior proceedings and introduced a resolution on the Senate floor raising a question as to some of the ABA's procedures. I do not think they are relevant here, but I think that general expression of reservation is appropriate, because there sometimes is a perception in this country that the lawyers have too much control over what goes on.

Speaking as a lawyer, but also as a citizen, I think that perception has a lot of merit to it. Sometimes the lawyers do have too much control over what goes on. And just as you have heard from many groups, so will this committee, and so will the Senate, so that we can take into consideration a much, much broader range of views.

With respect to the category of interviews with judges, your conclusions say that "Generally judges across the country who have become familiar with Justice Rehnquist have expressed admiration and respect for him as an able, hard-working, conscientious individual. On the whole, the judicial community was high in its praise of Justice Rehnquist's abilities and qualifications."

I note your qualification of the word "generally" at the start of the first sentence, and "on the whole" at the start of the second sentence, and I would inquire as to whether there was any significant minority view in terms of the appraisal given by judges on Mr. Justice Rehnquist.

Mr. LAFITTE. Senator, I think that the main reason, in my view, for the qualification is that the sentence speaks of expressions of admiration as well as respect. We had a lot of judges that were contacted who had had, you know, some contact with Justice Rehnquist, who regarded him as a very competent jurist, one clearly qualified to serve on the Supreme Court and to be Chief Justice, who I suppose we in fairness could not say had expressed great admiration or admiration for him because—well, for whatever reason.

So I suppose we felt that the qualification was necessary to be as accurate as we could in reporting to you.

Senator SPECTER. So that the limitation, as you articulate it now, goes to the issue of admiration as opposed to the issue of competency and qualification.

Mr. LAFITTE. Well, I do not mean to imply that there was no negative comment received from no judge across the country, Senator. I was simply saying that the word "generally," the sentence does deal with admiration, and the word "admiration" is in there because we felt it was important to convey to the committee the strong praise that we did receive from a great many judges across the country for Justice Rehnquist as a jurist.

Senator **Specter**. So you say you do not mean to imply that there was no negative comment. To what extent, if at all, was there negative comment among the judges?

Mr. **Lafitte**. Well, my best recall would be that the negative comment would have to do with his strong conservatism and whether he is flexible enough to serve as Chief Justice from that standpoint.

I do not mean to suggest—it was very difficult to quantify that, but I think when we had expression, it was along those lines.

Senator **Specter**. In your inquiries, did you have a catch-all question, as there sometimes is, about an overall evaluation? Or did you stop short of asking for that kind of a conclusory judgment from those whom you interviewed?

Mr. **Lafitte**. I think that in most of the contacts with judges, an overall conclusion was offered by them without even the question being asked. And generally, that conclusion was he is clearly well qualified. He is clearly entitled to the position, that kind of thing.

Senator **Specter**. Well, again, Mr. Lafitte, you say "generally." Was there any dissent?

Mr. **Lafitte**. If there was, Senator, it was very isolated. I do recall a couple of judges who felt that because of his conservative philosophy he ought not to be serving as Chief Justice.

Senator **Specter**. But those were only as to philosophy, not that he was unfair?

Mr. **Lafitte**. That is correct. I do not recall any comment about unfairness.

I recall comments about fairness, but not unfairness.

Senator **Specter**. In earlier testimony, you had made an observation about some negative comment when you were referring to inquiries among women and minority groups. And the response that you made related to "conservative philosophy," and whether he had a sufficiently open mind.

Were any of the objections raised going to the issue of fairness as opposed to philosophy?

When you talk about open mind, you may go to the issue of fairness, but I think there is an important distinction as to whether the thrust of those objections related to philosophy as opposed to a feeling of unfairness, or a conclusion or judgment of unfairness.

Mr. **Lafitte**. Senator, I do not recall any comment that I would have interpreted as a comment on Justice Rehnquist's unfairness and his inability to deal because of unfairness or bias on the issues of sexism or minorities.

Senator **Specter**. You raise another word for it, bias as well as unfairness. You are saying that that was not an expression of opinion by any of those whom you interviewed that went to that issue, fairness or bias? You are nodding yes?

Mr. **Lafitte**. I think I—I am sorry. Could you repeat your question? I do not think I understood you.

Senator SPECTER. Well, as I understand what you have said, there was no conclusion or no feeling expressed by those whom you interviewed that Mr. Justice Rehnquist was biased or unfair?

Mr. LAFITTE. I think that is correct, Senator. It might help you to understand. I used the word "unfair" because I think on the committee we may tend to think of bias and unfairness along the same lines. Our guidelines may indicate that.

Senator SPECTER. Mr. Lane, do you concur with the last answer by Mr. Lafitte?

Mr. LANE. Yes, I do.

Senator SPECTER. Among the 65 practicing lawyers whom you interviewed, can you give us an approximate breakdown as to how many were in the categories you have mentioned—women and minority lawyers?

Mr. LAFITTE. I did not count them, Senator. I hesitate to do that. We did make contact with blacks and minorities who are sitting judges and who are practicing lawyers, but I cannot give you a breakdown on the number.

Senator SPECTER. Could you supply that information to the committee? Would you supply that information to the committee?

Mr. LAFITTE. I do not see why not. Yes, sir.

Senator SPECTER. I would appreciate that.

Thank you very much, Mr. Chairman. Thank you very much, Mr. Lafitte and Mr. Lane.

The CHAIRMAN. The distinguished Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman.

Let me just make sure I understand the answer to Senator Specter's last question or last series of questions.

Is it that you heard no negative comments about Justice Rehnquist's ability to be fair and impartial? Is that correct?

Mr. LAFITTE. Senator, I think that is a fair assessment. The negative comment we heard with respect to the concerns expressed by minorities and women had to do with his conservative philosophy and the difficulty he would have, I think, in dealing with those issues so far as they were concerned.

Senator LEAHY. Maybe we can word it not as a negative, but as an affirmative question. Did you hear any negative comments about his ability to be fair and impartial?

Mr. LAFITTE. I think not, Senator. I have just expressed to you the way the comments that I am speaking about that were negative were phrased to us.

Senator LEAHY. The negative comments that you heard were about his philosophy but not about his ability to be fair and impartial?

Mr. LAFITTE. I think that is correct, sir.

Senator LEAHY. Do you both concur with that?

Mr. LANE. Yes; I do.

Senator LEAHY. Now, you looked, of course, at his legal abilities, as you have testified. Did you look at questions of his administrative abilities?

Mr. LAFITTE. We did, sir.

Senator LEAHY. What did you find there?

Mr. LAFITTE. Well, we had some kind of special work done on that. He has participated as a member of a national organization dealing with uniform State laws, and people who worked with him had an opportunity to observe his administrative abilities in that respect and thought very highly of them.

Others said they did not know much about it, but the comment we heard was very favorable about his administrative ability.

Senator **Leahy**. You both concur in that?

Mr. **Lane**. Yes, Senator Leahy.

Senator **Leahy**. What about questions of leadership? The Chief Justice has a lot of responsibilities for leadership knowledge within the Court, with the eight other members of the Court, but also through various other aspects of the whole Federal Judiciary. What about his leadership qualities?

Mr. **Lafitte**. Well, I think that the comment we heard on that issue, on that factor, was a sense of strong praise. Other members of the Court believe that he shows strong leadership qualities. Other judges and lawyers who have known him, all have high regard for him in that respect.

Senator **Leahy**. Now, in an area of particular concern to me, what about questions of his health? Did you go into that or was that beyond your brief?

Mr. **Lafitte**. Well, we did not discuss it with him because in the course of our investigation, we had no comment about it, really.

Senator **Leahy**. You had no comment?

Mr. **Lafitte**. Except to the extent that we may have had a couple of people who made reference to the fact that they understood at some time in the past that Justice Rehnquist had had a back problem, and they did not know how that was now, but very isolated.

Senator **Leahy**. Is that you initiated no questions about his health or you heard none volunteered to you?

Mr. **Lafitte**. Well, I cannot speak for other members as to the way the discussion went with the contacts they made, but I recall no reports in which his health was raised as an issue.

Senator **Leahy**. Did you ask any questions about that?

Mr. **Lafitte**. Did I personally?

Senator **Leahy**. Yes.

Mr. **Lafitte**. I did not.

Senator **Leahy**. Sir, would that be about the same answer?

Mr. **Lane**. Well, I asked at one point in one of the interviews, of one of his colleagues on the Court—I asked about his health and was assured that he's a vigorous, hard-working member of the Court. I never really pursued it.

The **Chairman**. Mr. Lane, speak a little bit louder and in your microphone so we can all hear you.

Mr. **Lane**. Did you get that answer?

Senator **Leahy**. I think the chairman wanted you to repeat it, Mr. Lane.

Mr. **Lane**. I would be happy to.

I think in one of my interviews with one of his colleagues on the Court, I mentioned health or it came up in the course of a discussion of his work habits. It was indicated to me that he is one of the hardest working members of the Court and has no trouble keeping up with the work of the Court.

What it meant to me was that there does not appear to be any health problems. There were no health problems detected in the course of our interview. Mr. Lafitte went up to your fine State way up in the northern part of Vermont to interview the Justice.

It is a beautiful area.

Senator LEAHY. I was going to say, that is a hell of a hardship tour.

Mr. LAFITTE. The temperature is a little different from New Orleans.

Senator LEAHY. It really is.

Mr. LANE. He looked well and relaxed during that interview.

Senator LEAHY. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Kentucky.

Senator MCCONNELL. Gentlemen, at the risk of being redundant, then is it safe for us to conclude that all or virtually all of the very few negative observations about Mr. Justice Rehnquist were related to his judicial philosophy?

Mr. LAFITTE. I think that is correct, Senator.

Senator MCCONNELL. All of the observations?

Mr. LAFITTE. I cannot recall. I will not say that there was no one who said he is——

Senator MCCONNELL. But you cannot recall a single negative observation about Mr. Justice Rehnquist other than his political philosophy?

You either, Mr. Lane?

Mr. LANE. No; I think that is correct. I do not recall anything other than people who commented on the fact that he was too conservative.

Senator MCCONNELL. Let me just say, I think we must all conclude that that is a truly remarkable thing; that you talked to lawyers all over the country, on the bench, off the bench, and heard not a single negative observation about a man who has been in public service for 15 years, other than his political philosophy. Leading me to conclude, gentlemen, that the President has made here a truly outstanding nomination, because I do not know anybody else—certainly no one in this body—who could be in public service and in combat and in dealing with the political issues that come before us for such an extensive period of time and generate so few or, in fact, no negative observations about anything other than philosophy.

Mr. LAFITTE. Senator, I do not want to mislead you. I think that, in view of the breadth of your statement, I need to point out that, for example, we had received what you might call negative comment with respect to the matter that had been reported in the media about the memorandum that Justice Rehnquist had written as a law clerk, when he was a law clerk, to Justice Jackson. Those are matters that I think have been widely published.

Senator MCCONNELL. That is a philosophical observation.

Mr. LAFITTE. I just wanted you to know.

Senator MCCONNELL. By any interpretation, it is a philosophical observation.

Mr. LAFITTE. It is a matter of trying to be as enlightening to you as I can.

Senator MCCONNELL. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator **Heflin**. I want to pursue an issue that has been raised as to collegiality and consensus building, both qualities in the role of a Chief Justice.

I think we have given statements here yesterday and today and it has been in the press that there have certainly been occasions when there was a tremendous need for a consensus builder, where the quality of collegiality would have been involved. Such as Brown versus the Board of Education where you had a unanimous Court and the tapes case in the Watergate era, those certainly.

But I believe there are certain bounds and that there is a balance relative to consensus building and even collegiality that we may sometimes overlook. There is perhaps a danger of too much of an ability of one individual to build a consensus in the regular routine of case.

Were there any reports, at least from the media, that the Court is presently divided into at least three groups, perhaps more: a conservative wing, a democratic wing, and then a swing group which is in the middle? That swing group has a potential for a person who has strong ideas, strong beliefs, to try to obtain their support.

Was there any evidence in your investigation on the part of Associate Justice Rehnquist that he politicked his views, his opinions, his position relative to a case that might be before it?

Mr. **Lafitte**. Senator, the answer to that is no. I think the reports that I can convey to you were reports of high admiration, high esteem for Justice Rehnquist in terms of his intellect, in terms of the collegiality of his relationship with the other members of the Court, and with his work habits. So the comments we received were, so far as I know, broader than maybe the limits of the precise question you are asking, but all of that suggests to me that he is regarded as one who is a leader and who can serve well as Chief Justice from that standpoint.

Mr. Lane may want to supplement what I have said.

Mr. **Lane**. Well, I gained the impression, Senator Heflin, that Justice Rehnquist, because of his many years of service on the Court, is now a very experienced and seasoned Justice. He understands perfectly well how the process works, and that you have eight other Justices. In our little discussion with him, he referred to them as like dealing with eight small law firms. And you have to have a majority in order to get anything done.

He appreciates and understands as well as anyone in this country the need to get a consensus. He has to get five votes in order to accomplish what he would wish to do in any particular case.

And I was told by one of his colleagues, one who I have the greatest respect for * * * that he looks for a tremendous improvement in the functioning of this Court. He thinks that Justice Rehnquist—if I can remember his words—will help pull this Court together, that this man has a deep interest in the product of the Court, which is the Court's opinions.

With these comments that I received from people that have tremendous regard for, I came away with a very strong opinion that Justice Rehnquist will make an excellent Chief Justice.

Now, I do not know whether that answers your question.

Senator **Heflin**. Well, I think to some degree it does. There could be some danger. I think there is a danger. I think an opinion or a holding ought to stand on its own merits. But in many instances, I think there is a fine line of demarcation that has to be drawn, and it is somewhere in the middle as to how far one should go and one should not go in that matter.

That, in effect, sort of brings up another question as to your statements that there were no negative comments on fairness or bias. This is really unusual because the subjective evaluation of ideology in the past has been in the past that if someone disagreed, they may have felt you had a bias or you had a lack of fairness relative to your position.

And since you had no negative comments whatsoever on fairness and bias, and we have been through an era which, in effect, has generated ideological issues that involve bias and fairness, I think that that is a remarkable comment that you have made and a remarkable finding that you have had.

One of you mentioned awhile ago something about the assignment to his law clerks—that he gave them 10 days. Was there any indication that the work product of his opinion was more of a law clerk than it was of his own language, his own writings? You said something about a law clerk having 10 days in which to finish, and I am not sure exactly what I understood from that.

Mr. **Lane**. Well, to the contrary, Justice Rehnquist reads the briefs and prepares for oral argument. He does not use a bench memorandum. What he does is read the briefs, as any good judge should, and then he sits down and discusses the case with his clerk prior to oral argument. He tries to get himself personally prepared for the argument of that case, and he regards oral argument as a very important part of the process.

But once an opinion is being prepared or being written, or if there is a memorandum on a point of law, and the assignment is given to the clerk, it is my understanding that he puts tight deadlines so that he can control the work of his own office and the productivity of that office.

If a clerk is having problems with something, he can move in and help and get the process moving along, which I thought was a very good thing.

Mr. **Lafitte**. But, Senator Heflin, he uses the law clerk's first draft as a first draft and then goes from there. It is a rough product to give him the foundation for the work that then must go on to develop the opinion.

I think that he would use maybe a very low percentage of one first draft and maybe a higher percentage of another, but it is just that, a rough draft.

Senator **Heflin**. Let me ask you about the makeup of your committee. I assume here that Mr. Fiske is your chairman. What type of practice does Mr. Fiske have?

Mr. **Lafitte**. Well, I know he does some antitrust work because that is what he is involved in right now.

I believe that he heads up the litigation section of Davis, Polk & Wardwell in New York so I am sure it is a high-powered, large city practice.

He is a former U.S. attorney, by the way, as you may know, Senator.

Senator HEFLIN. What type of practice has Mr. Lancaster of Portland, ME?

Mr. LAFITTE. Well, I am not sure I can deal specifically with his clientele. I know he is an eminent trial lawyer, and I think he has a very broad, broad trial practice, all kinds of cases that take him outside of the State of Maine.

I do not know who he represents and in precisely what areas.

Senator HEFLIN. Bob McCrate, I believe, is at Sullivan & Cromwell in New York, and Mr. Jerome J. Shestak is in Philadelphia, what type——

Mr. LAFITTE. Well, again, Mr. Shestak has a reputation of being an outstanding trial lawyer. He is with a large Philadelphia firm and, so far as I know, has a very general practice. I think he also has a lot of first amendment cases.

Mr. LANE. Communications.

Mr. LAFITTE. First amendment cases, and John Lane was just telling me in the communications field he seems to be quite active.

Senator HEFLIN. What about Mr. Howard of Norfolk, VA?

Mr. LAFITTE. He is also a trial lawyer. I do not know the nature of Mr. Howard's practice, or even the size of his firm.

Mr. Lane thinks that most of his work is in the insurance defense business.

Senator HEFLIN. How about Mr. Lafitte? You ought to know about his practice.

Mr. LAFITTE. Well, I am not sure I do, Senator. My partner is wondering about that.

I spend my time in litigation in various fields, oil and gas, commercial litigation.

Senator HEFLIN. Mr. Elam of Columbus, OH.

Mr. LAFITTE. I would say that he is also a trial lawyer. I would say that he has a practice similar to mine, although he does a lot of work in commercial areas. A very fine lawyer; I know him well.

Senator HEFLIN. Mr. Hewlett of Lincoln, NE.

Mr. LAFITTE. I think Mr. Hewitt is more of a business-type lawyer. He is currently the president of the State bar there, I know, but I do not know the kind of—when I say business, I would think he would have to do with commercial transactions, tax work perhaps, that kind of thing.

Senator HEFLIN. Mr. Gavin of Washington.

Mr. LAFITTE. Also a trial lawyer, Senator.

Senator HEFLIN. Mr. Williams of Los Angeles.

Mr. LAFITTE. He is with a large firm in Los Angeles. I do not know the kind of work he does.

Senator HEFLIN. Mr. Clark of Denver, CO.

Mr. LAFITTE. I am afraid I cannot be of help there. He is with a large firm, I know that, and I think does general litigation. But I am not positive.

Senator HEFLIN. Mr. Nachman of Montgomery, whom I know quite well, is well versed, does a great general practice.

Mr. LAFITTE. Yes, as a trial lawyer he is very well known.

Senator HEFLIN. He is involved in many matters. Judge Frank Johnson has appointed him chairman of the Human Rights Committee pertaining to prisons and things like that. He is a well-rounded individual.

Mr. **Lafitte**. Yes.

Senator **Heflin**. Thank you. That is all.

The **Chairman**. The distinguished Senator from North Carolina.

Senator **Broyhill**. Thank you, Mr. Chairman.

As usual, when you get down to this end of the committee, all the questions have been exhausted. But thank you very much, gentlemen, for your very complete testimony here.

How many years has the American Bar Association conducted these types of investigations and offered these evaluations of nominations for the Supreme Court?

Mr. **Lafitte**. Senator, I am sure the type of the investigation might have varied over the years or changed over the years, but for over 30 years I think the President has sought the advice of our committee through the Department of Justice as to virtually all the nominees. I think since 1948 the Senate has requested our opinion.

As I say, I have been on the committee 5 years, and the kind of investigation we do now is what we have been doing for that period of time.

Senator **Broyhill**. Well, is this high evaluation of a nominee, well qualified, is that unusual? In the past history of these evaluations, have you failed to give that high qualification to a nominee in any cases in the past?

Mr. **Lafitte**. I do not know that I can—the only experience that I can draw upon is the nomination of Justice O'Connor. I think that was a different evaluation, primarily because of the difference in her background and the different level of her experience. But it was certainly a vote of strong approval.

Beyond that, Senator, I am not sure. I am not even sure of the rating given to Justice Rehnquist on his initial advance to the Supreme Court.

Senator **Broyhill**. Speaking personally, I am impressed with the exhaustive nature of the American Bar Association's investigation of Justice Rehnquist. I understand that over 70 practicing attorneys were interviewed, 50 deans and faculties of law schools, 180 Federal and State judges, as well as all associates of the Supreme Court, and many others.

Now, I assume that all members of your committee were involved in this and not just one or two members of the committee.

Mr. **Lafitte**. All members of the committee participated, Senator.

Senator **Broyhill**. Could you describe briefly, since we do have to rush off here for a rollcall, whether or not these were very short interviews—hey, Joe, what do you know about Rehnquist? Or was it an exhaustive interview? Did you follow a formal questionnaire approach?

Mr. **Lafitte**. It is generally telephone contacts, Senator, because of the logistics of the problem. The interviews vary in length, depending on how much the individual feels like talking. Some of them are rather very lengthy. Others are quite short.

We do ask questions and get responses.

Senator **Broyhill**. But in every case, everyone who is contacted is invited to contact you; in other words, the record, in effect, is left open if they wish to contact you in writing with any additional comments or opinions?

Mr. LAFITTE. Well, we are happy to receive any. I cannot say that when we make the contact everyone makes that point with the interviewee, but certainly, in the course of our investigation, sometimes we get volunteers who will contact us with information.

Senator BROYHILL. I thank you very much.

Mr. LAFITTE. Thank you, sir.

Senator BROYHILL. I note that a vote is pending on the Senate floor.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. I shall be very brief, Mr. Chairman.

First, just a comment. I have met with Mr. Fiske, the Chair of your committee on two occasions. I have had breakfast with the president of the ABA and the president-elect. I have expressed, and this is prior to the Manion nomination, it has nothing to do with the Rehnquist nomination—I have expressed concern that the American Bar Association is not maintaining high enough standards in approving Federal judges. It is a continuing concern that I have, and I simply pass that along.

Two questions, very briefly: One is, if you were a member of this committee, would you vote to confirm Justice Rehnquist? You have answered this by implication, but you have not answered it directly. I will ask each of you.

Mr. LAFITTE. I would, sir.

Mr. LANE. Yes; I would, too.

Senator SIMON. OK. Then the second question: The Chief Justice of the Supreme Court takes on many roles; one is administrator of the Court, one is to assign cases and so forth. One is also a symbolic role as representing justice for all: for minorities, for women, that symbolic role of Chief Justice.

Would Justice Rehnquist fill that symbolic role well on the basis of what you have read of his opinions and what you know?

Mr. LAFITTE. Well, I think, Senator, clearly, there would be dissent from the view of one who would answer in the affirmative, because I think there are people who have expressed concerns to us that I have tried to convey to the committee this morning, and the reasons for those concerns. So I do not know that—I certainly cannot report to you that all would feel that he would be entitled to be considered in that light.

Senator SIMON. Mr. Lane?

Mr. LANE. Your question goes to the very heart of what I was trying to get at in my investigation and the interviews that I conducted. It was almost the type of question that I pressed.

What I found was that, among those who knew the Justice best, the ones who really knew him, who had experience with him, either when he was in the Department of Justice on legal matters or since he has come to the Court, were of an opinion that he would make a very positive contribution and would make a very fine Chief Justice of the United States.

That is the best way I can answer it. It is based on what I received, the feedback that I got in the course of my personal examination.

Senator SIMON. You are not quite answering my question, Mr. Lane. Would he represent justice for everyone? Would he be a good symbol for minorities, for women, for others who may not feel they are—and who sometimes are not—getting the right breaks in our society?

Mr. LANE. I think he would make an effort to, and whether or not that would be understood and whether everyone would agree is another question.

Mr. LAFITTE. Yes. That is what I was trying to say, Senator. I would agree with that. I would think so, but I would understand that others might not agree with that.

Senator SIMON. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The 5-minute bell is on. Actually, we only have about 4 more minutes, but I just wanted to ask you this question.

In your investigation, you interviewed judges; that is correct, isn't it?

Mr. LAFITTE. Yes, sir.

The CHAIRMAN. I notice from what you say here that the judges had to say this about Justice Rehnquist, and these are some excerpts from your report. A true scholar, collegial, genial, low key. Another: unbelievably brilliant. Another: a very capable individual in every respect. Another: able, hard-working, conscientious individual. Another: enjoys the respect and esteem of his colleagues on the Court.

Do you feel that that is a fair appraisal of Mr. Rehnquist by the judges?

Mr. LAFITTE. Well, yes, Senator. I think we tried to use those quotes in order to give the committee some idea of the kind of comment we were receiving from those who were high in their praise of Justice Rehnquist.

The CHAIRMAN. Thank you.

Now, on the interviews with lawyers, I notice some quotes. Very talented. Another: a brilliant and able man. Another: one who brings out the best in people. Another: will facilitate the work of the Court.

Do you feel that that represents the thinking of the lawyers that you interviewed?

Mr. LANE. Yes, Mr. Chairman.

Mr. LAFITTE. Yes, sir.

The CHAIRMAN. Then with the interviews with deans and professors of law. Many of these individuals spoke highly of his writing and analytical ability. The vast majority has strong praise for his professional qualification. That is from deans and professors of law.

Do you feel that is typical of the way they feel?

Mr. LAFITTE. I think so, Senator, and I might say that a number of these people commented that they differed strongly with Justice Rehnquist with respect to his judicial philosophy, but they felt that way about his competence.

The CHAIRMAN. And then as to a survey of his opinions, 200 of Justice Rehnquist's opinions were examined, and it was concluded that the Justice's legal analysis and writing ability are of the highest quality.

Is that your feeling as to the appraisal of the opinions that you examined?

Mr. **Lafitte**. That is correct, sir.

The **Chairman**. Now, as I understand, the American Bar has three ratings: well qualified—that's the highest; next, not opposed by the committee; and third, not qualified.

The American Bar, as I understand from you, recommends him as well qualified; is that correct?

Mr. **Lafitte**. That is correct, sir.

The **Chairman**. Do you gentlemen of the committee recommend him to the Senate Judiciary Committee to be approved by this committee and the Senate?

Mr. **Lafitte**. That is our recommendation, sir.

The **Chairman**. We are now going to take a recess until 2 o'clock. We have got some different votes coming up so we will come back at 2 o'clock. You gentlemen are excused.

[Whereupon, at 11:42 a.m., the committee adjourned, subject to the call of the Chair.]

AFTERNOON SESSION

[Whereupon, at 2 p.m., the committee reconvened, Hon. Strom Thurmond, chairman, presiding.]

The **Chairman**. The committee will come to order. It is 2 o'clock. Are there any Democratic staff members here? You might tell your Senators.

Is Senator Biden's staff member here, the ranking minority member? If so, I would like for you to call him.

[Pause.]

The **Chairman**. It looks like we are going to have to take a recess for 5 minutes.

[Brief recess.]

The **Chairman**. Judge Rehnquist, I would remind you that you are still under oath, Mr. Justice.

TESTIMONY OF HON. WILLIAM H. REHNQUIST, NOMINEE, TO BE CHIEF JUSTICE OF THE UNITED STATES

Justice **Rehnquist**. Yes, Mr. Chairman.

The **Chairman**. We are going to alternate 20 minutes each. I will take 20 minutes, Senator Biden 20 minutes; then we will pass on to other members 20 minutes each.

We will turn the red light on at 19 minutes so they see they have 1 more minute to wind up.

Justice Rehnquist, since the announcement of your nomination to be Chief Justice of the United States, there has been much talk about the opportunity you will have to lead the Court in a new conservative direction.

Would you please tell the committee to what extent you believe that a Chief Justice can influence, if at all, the philosophical direction of the Court?

Justice **Rehnquist**. Mr. Chairman, members of the committee, I think that the Chief Justice can exercise a certain amount of leadership on the Court, but I do not think it is apt to be in a philosophical direction.

Several of the cases this morning that were mentioned—*Brown* v. *The Board of Education,* the Nixon tapes case—were those kind of rare great cases where I think the Court develops a consensus that the opinion ought to be written by the Chief Justice, and there is a real institutional feeling that it ought to be unanimous, if possible.

You take another case like the steel seizure case, which was an equally important case, and there the Chief Justice was in a minority of three. The only way for him to have led the Court there would have been to change his own vote and make it 7 to 2. I do not think that is leadership to simply say that since you are outvoted you will change your mind.

I think the Chief Justice does have a couple prerogatives, again, that have been mentioned: the authority to lead the conference discussion and the authority to assign cases. And I think both of these, properly exercised, can lead to a smoothly functioning Court. But the idea that the power to lead the conference discussion to start off and be the first one to discuss means that the Chief Justice can pull the wool over other people's eyes by his discussion and make them think that green is blue, my 15 years on the Court convinces me that is not the case.

The same with the assignment power. The Chief Justice, by properly exercising the assignment power, can pick out the strengths and weaknesses of his colleagues, play on the strengths, avoid the weaknesses, and again, work toward a smoothly functioning Court.

But if the Chief Justice assigns the case to someone who feels very much the way he does about it, but not like the majority of the Court feels about it, the person to whom the case is assigned is not going to be able to get a Court opinion.

So I think the Chief Justice does have a leadership role, Mr. Chairman, but I do not think it has much to do with the philosophical direction of the Court.

The CHAIRMAN. Justice Rehnquist, we will again hear allegations today that you harassed voters in the polling place in the 1960's. This allegation has already been covered during your hearing in 1971 for Associate Justice.

At that time, you responded to questions concerninq these allegations and submitted a lengthy written rebuttal. However, a few individuals have now come forward, some 20 plus years later, with the same information.

There is nothing new that I am aware of regarding this matter. I reviewed the FBI report and found absolutely no new information to support these charges.

Justice Rehnquist, how do you respond to these allegations?

Justice REHNQUIST. In the absence of any more careful description of the allegations, I think I would say, Mr. Chairman, that I have reread very carefully the statement I made to the committee in 1971 and have absolutely no reason to doubt its correctness now.

The CHAIRMAN. Justice Rehnquist, in the past several decades, the caseload of the Supreme Court has grown rapidly as our laws have become far more numerous and complex. In an effort to reduce the pressures on the Supreme Court, an intercircuit panel was proposed to assist the Court in deciding cases which involve a conflict among the judicial circuits.

The Judiciary Committee on June 12, 1986, approved legislation establishing such a panel on a trial basis. As you know, Chief Justice Burger has been a strong advocate of this panel.

Would you please give the committee your thoughts on the current caseload of the Court and the need for an intercircuit panel?

Justice **Rehnquist**. I would be happy to, Mr. Chairman.

I think we do need an intercircuit panel of some sort, and I so stated publicly, as has the Chief Justice. Different reasons have been assigned for it. There are nuances of differences, as I understand it, as to how the panel would be made up. But I think the basic problem is this: That for the last 50 years, the Supreme Court has never heard more than about 150 or 160 cases a year on the merits, as opposed to just denying certiorari. And I do not think any careful student of the Court thinks that the Court ought to try to hear more than 150 cases a year.

So that in this country right now, we have a nationwide decisionmaking capacity for questions involving Federal statutory law and constitutional law of 150 cases a year. Now, that just is not a large enough nationwide decisionmaking capacity, in my view, to accommodate the need to resolve conflicts among the circuits on statutory questions and to decide debatable, novel, constitutional questions.

Again, 50 years ago, the Court had roughly 800 petitions for certiorari which gives you some rough idea of how many cases the Federal courts of appeals and the State supreme courts were turning out.

Today, we have somewhere around 4,500 petitions for certiorari, an increase of almost sixfold, and yet the nationwide decisionmaking capacity is exactly what it was 50 years ago. I think we very badly need to increase that nationwide decisionmaking capacity by creating some version of the intercircuit tribunal to which your question refers, Mr. Chairman.

The **Chairman**. Justice Rehnquist, in a dissenting opinion in *Community Communications Company* v. *City of Boulder,* a 1982 case, you discussed the Federal preemption of the State law in the context of an antitrust challenge to certain actions by a municipal government.

Would you please tell the committee what in a general sense you perceive as the proper relationship between Federal and State law?

Justice **Rehnquist**. Mr. Chairman, I think Congress is probably the ultimate decider as to what the proper relationship between State and Federal law is in most situations. Our Court has adopted various preemption doctrines which allow it to interpret whether or not in a given set of circumstances Federal law, which does not say so in so many words, nonetheless preempts State law. And I joined in a number of opinions to that effect, and it strikes me as a sound exposition of the doctrine.

But how much is going to be Federal law in any area in which the Congress power reaches and how much is going to be State law, really in the last analysis, depends upon Congress.

The **Chairman**. Justice Rehnquist, in 1976, an article which you authored entitled, "The Notion of a Living Constitution," appeared in the May 1976 edition of the Texas Law Review. This article addressed the issue of how the Constitution is to be interpreted by judges.

In recent years, the debate on this subject has increased, and a number of questions have been raised, such as: Are the words of the Constitution to be narrowly construed? What weight is to be given to the intent of the framers of the Constitution? Should the instrument be interpreted to conform with or adjust to conventional societal behavior or attitudes, and so forth.

Of course, a judge's philosophy on this type of issue obviously has a direct and substantial bearing on his or her decision.

Justice Rehnquist, would you please briefly summarize for the committee your views concerning constitutional interpretation by the judiciary?

Justice REHNQUIST. Mr. Chairman, I will certainly do the best I can within the limits of the constraints which I feel are on me.

As a sitting Justice of the Court, I may certainly refer to cases and perhaps try to describe them from memory, and I feel I can also perhaps, where I am informed, speak in fairly general terms. But I could not, of course, express any view on a question that might come before the Court or I could not attempt to say, well, you know, this case that was decided in 1980 will soon be interpreted, or maybe later be interpreted to mean such and such.

This may seem an overly simplistic answer to your question, but it is the kind of question that has to be answered either very shortly or ad infinitum because there are so many nuances.

I think a judge has the obligation, when sitting in a Federal system like ours under a written Constitution, to attempt to use every bit of information and every method he can in order to find out what the Constitution means.

Certainly a large part of this is the written word that the framers used, not the undisclosed intentions of the framers, but the words that they used.

Other useful things are the previous decisions of the Court which have always represented a decision by nine people—or at least nine since some time in the 1830's—who have taken the same oath of office that the then-sitting Justice had, and who presumably have done their best to figure out what it means.

And I think that is as good a short answer as I can give you.

The CHAIRMAN. Justice Rehnquist, a fundamental principle of American judicial review is respect for precedent, for the doctrine of stare decisis. This doctrine promotes certainty in the administration of the law, and yet at least 182 times in its history, the Supreme Court has overruled one or more of its precedents. More than half of these overruling opinions have been issued since 1950. Actually, 96 since 1950.

Justice Rehnquist, would you tell the committee what factors you believe attribute to this increase in overruling previous opinions?

Justice REHNQUIST. I will certainly venture my opinion, Mr. Chairman, although I have not done the research that I would like to do in order to make a more careful answer.

I think the biggest thing about the caseload of the Supreme Court in 1950 and the caseload today is the vast increase in the number of decisions involving constitutional questions. The principle followed by the Court following Justice Brandeis' opinion, I believe, in either the *Ashwander* or the *Burnett* case, is that stare decisis is a very fine rule of law, and it should virtually be unanimously adhered to when you are talking about construing a statute. But when you are talking about construing a provision of the Constitution where Congress cannot come back and change it if it feels the Court has made a mistake, then there is more latitude for overruling precedent.

I think that probably the reason there have been so many more overrulings since 1950 is that a much larger percentage of the Court's docket has involved constitutional cases.

The CHAIRMAN. Justice Rehnquist, the fourth amendment exclusionary rule was judicially created to prohibit admission of illegally seized evidence. However, the Supreme Court stated in *Stone* v. *Powell*, a 1976 decision, that the fourth amendment has never been interpreted to prescribe the introduction of illegal seized evidence in all proceedings or against all persons.

Recent decisions such as *United States* v. *Leon* and *Massachusetts* v. *Shepard* have recognized a good-faith exception as applied to search warrants.

Would you please briefly discuss the Court's recent approach toward narrowing the application of the fourth amendment exclusionary rule?

Justice REHNQUIST. Again, Mr. Chairman, I am on somewhat difficult grounds, because I think I can describe the holdings of the cases which you describe, and of course, I will be describing them from memory, and I should state very emphatically that it is the opinion of the Court in those cases that speaks authoritatively. My synopsis from memory may well have some errors in it.

But I also realize that you cannot at an oral hearing such as this simply point to a volume of the U.S. Reports and tell someone to go look at it.

So, in Stone against Powell, the Court held that——

The CHAIRMAN. Speak into your mike.

Justice REHNQUIST. Surely. I am sorry, Mr. Chairman.

When a fourth amendment claim had been fully decided against a criminal defendant in the State court system, that the same claim could not be renewed on Federal habeas corpus in an effort to have the State court decision set aside because of a violation of the exclusionary rule.

United States against Leon and Massachusetts against Shepard held—and I think it was only in the case of a warrant—that if there was a good-faith mistake on the part of the officer seeking the warrant and his conduct was objectively reasonable, although it turned out it was mistaken, that the exclusionary rule would not be applied in those cases.

The CHAIRMAN. Justice Rehnquist, division within the Supreme Court is increasing. Between 1801 and 1900, the average number of cases per term decided by a bare majority was one. The trend during this century has been one where the number of 5-to-4 decisions is ever increasing. In fact, in the just completed 1985 term, 37 cases were decided in whole or in part by five-to-four votes.

Justice Rehnquist, would you tell the committee what, in your opinion, has attributed to the increase in the bare majority decisions?

Justice REHNQUIST. Mr. Chairman, again, I will certainly venture an answer without having had the opportunity to look into it the way I might like to if I were to give a more comprehensive answer.

The staple of the Court's work in the 19th century was basically common law. Most of the cases were in the Federal system by reason of diversity of citizenship, and the principles were what were called general principles of common law. There were very few statutes involved.

That was in the days when being learned in the law had a very definite connotation. When you said a judge was learned in the law, it meant that he knew Story's Commentaries, and various other commentaries which were largely based on the common law. And so there was a good deal of unanimity of opinion in those days. There was not the sort of discussion, debate, and controversy that has come in the 20th century with difficult questions of statutory interpretation and, again, the increasing constitutional docket of the Court, where we deal often with fairly broad, general phrases, disagreements are natural as to their meaning, and as a result, there are going to be divisions that there were not when you were just dealing with the general common law.

The CHAIRMAN. Justice Rehnquist, at present, Federal judges serve during good behavior, which, in effect, is life tenure. Federal judges decide when they should retire and when they are able to continue to serve. Congress, in the Judicial Conduct and Disability Act of 1980, provided some limited ability for the judicial councils of the circuits to act with respect to judges who are no longer able to serve adequately, whether because of age, disability, or the like.

The Supreme Court is not covered by this act. Justice Rehnquist, do you feel the Supreme Court should be covered by the Judicial Conduct and Disability Act? And would you give the committee your opinion on the need to establish a constitutional amendment on mandatory retirement age for judges and justices?

Justice REHNQUIST. The first part of your question, Mr. Chairman, I think was whether the Supreme Court should be covered by the Judicial Conduct Act. There was a good deal of feeling, I think, among the lower court Federal judges that they had some reservations, as you might imagine, about the Judicial Conduct Act, though I think many of them agree that something of that sort may be necessary.

But I think with all respect to those judges, that if you are talking about even a judicial council determining that one of nine members of the Supreme Court is unable to serve and avoiding the impeachment requirement of the Constitution, that is something I would want to take a very, very long look at. And I think the way to do that would be to see how the Judicial Conduct Act works when applied to the judges to whom it is now applicable.

I think one should take a couple of very close looks before translating that to the Supreme Court.

The CHAIRMAN. For the information of the members who were not here when I made the announcement, we are allowing the members 20 minutes. The red light will come on after 19 minutes, so they will have 1 minute to wind up.

The distinguished Senator from Delaware.

Senator BIDEN. Thank you, Mr. Chairman.

Again, welcome, Mr. Justice, and it should be noted lest any of us lose our perspective here that you are on the Supreme Court and that you will be on the Supreme Court regardless of what happens in this hearing.

Mr. Justice, what I would like to do if I may is go back and cover a little ground that has already been covered by the chairman and maybe in a little bit more detail if I may in this first round.

Yesterday former Federal judge and former Attorney General Griffin Bell, in response to questions regarding whether or not there was a need for unanimity in certain occasions in Court decisions said, and I quote at page 96 of the transcript, "It would have meant"—referring to the Nixon tapes case—"It would have meant that the people often have doubt as to whether a Supreme Court decision is the law. And if it is a close decision, 5 to 4, or something like we have been getting in recent years, what we call the 'plurality opinion', people are not inclined to follow those decisions, and they do not know for sure what the law is."

Skipping down, still quoting, "The Brown decision was hard enough to carry out, and if it had been a divided Court, it would probably not have been carried out."

Continuing to quote, skipping a paragraph: "There are some of these cutting edge issues that face society."

Further on in Judge Bell's testimony, in response to a question, "Do you think that Justice Douglas would have been a good Chief Justice at the time he was on the bench?" the answer was that he would not have been a good Chief Justice. "That takes nothing away from his ability." End of quote.

Now, what I would like to know is whether or not you agree with Judge Bell's statements regarding how difficult the *Brown* decision would have been to carry out had there not been absolute unanimity, and whether or not you think Justice Douglas would have made a good Chief Justice.

Justice **Rehnquist**. As to the first question, Senator Biden, certainly at the time I was a law clerk when *Brown* was first argued, there was talk about the South possibly shutting down the public school system. I would defer to Judge Bell's judgment, even if it did not coincide with mine, because he is from Georgia, and that is where the decision was going to be operative.

And then I would certainly add, yes, unanimity was certainly essential.

And as to Justice Douglas and the Chief Justiceship, I think I remember Judge Bell yesterday saying he did not think he would ever have accepted. And I think that is where I would rather leave it.

Really, I think if he had accepted it—he was a remarkably able person—if he had accepted it, I think he would have put his hand to it and done a good job. But I just do not think he ever would have accepted it.

Senator **Biden**. Let us talk about the *Brown* case a minute. In his book, "Simple Justice," Richard Kluger describes the very careful and deliberate process by which Chief Justice Warren worked to achieve a unanimous vote in the *Brown* decision. Do you agree with me that by reaching and engaging in that process, Chief Justice Warren was serving a critical function?

Justice **Rehnquist**. Yes. I am not sure I have read the book in full that you mention. I have read a recent biography of Chief Justice Warren which certainly makes the same point, and I do agree.

Senator **Biden**. I would like to read a passage from the book, if I may, for you, where the author says, "The new Chief Justice was determined to create a unanimous ruling, but he knew Reed was very troubled," Justice Reed.

> The Chief lunched with Reed 20 times between the first conference the Court held on the Brown case and early May. And finally, the Chief went to see him, and his former clerk, George Mickum,

M-i-c-k-u-m, Mickum, I believe that is the correct pronunciation,

> who was on hand, summarized the meetings as follows,

quoting the clerk:

> He said, "Stan, you are all by yourself in this now," Mickum recalls. "You have got to decide whether it is really the best thing for the country." He empathized with Justice Reed's concerns, but he was quite firm on the Court's need for unanimity on a matter of this sensitivity.
>
> Mickum then discussed his conversation with Reed after the Chief left. "I think he was really troubled by the possible consequences of his position," Mickum added. "Because he was a Southerner, even a lone dissent by him would give a lot of people a lot of grist for making trouble. For the good of the country, he put aside his own basis for dissent."

My question to you, Mr. Justice, is whether you would have done what the Chief did, generally, in the case, and specifically, whether you would have gone to Reed and made those arguments.

Justice **Rehnquist**. The question is very difficult to answer, Senator. Certainly, from the point of view of hindsight, realizing the importance of *Brown*, the importance of unanimity, one would like to say in answer to the question: "Yes, of course I would." And I think I can probably answer the same way, that if I had seen the thing, seen the case the way the Chief Justice did, and the need for unanimity, I certainly would have tried to persuade a last dissenting colleague that it would be better for the country to make it unanimous.

Senator **Biden**. Did you see the case as the Chief saw it at the time? You were there.

Justice **Rehnquist**. I was not—I think——

Senator **Biden**. Not at the time of the decision, but you were there——

Justice **Rehnquist**. I was there when it was argued for Chief Justice Vinson.

Senator **Biden**. Correct.

Justice **Rehnquist**. You are asking me what I thought of it as a law clerk?

Senator **Biden**. Yes. At the time, did you see it as the Chief saw it, with regard to the merits of the case; and second, with regard to what the Chief, the later Chief, what the Chief later did on the second term that it was argued in——

Justice **Rehnquist**. I do not know that law clerks think in terms of the need for unanimity, but I do not think I saw it as a law clerk as Chief Justice Warren later came to see it.

Senator **Biden**. How did you see it as a law clerk at the time?

Justice **Rehnquist**. I thought that—putting myself back in 1952 as best I can—I thought that *Plessey* against *Ferguson* was wrong in saying that when you segregate races by law you are not depriving anybody of equal protection. I also thought that *Plessey* against *Ferguson* had been on the books for 69 years, that the same Congress that promulgated the 14th amendment had required segregated schools in the District. I saw factors on both sides, I think.

Senator BIDEN. You graduated No. 1 in your class from Stanford Law School. You were picked as one of the most outstanding law graduates in America to clerk at the Court. And you obviously were not, although you were not a sitting Justice, you were a very, as you are now, a very, very bright person with as significant a legal background as you could have had at the moment. And you are unable to give me a more definitive answer as to how you felt at the time? Did you believe it was the wrong decision at the time?

Justice REHNQUIST. Did I think that *Plessey* was wrong?

Senator BIDEN. No. Do you think that the decision ultimately reached in *Brown* was the incorrect decision?

Justice REHNQUIST. When *Brown* came down?

Senator BIDEN. When *Brown* came down.

Justice REHNQUIST. No, I do not think I did, because when the Court went on record saying that, the stare decisis problem was gone.

Senator BIDEN. Isn't that somewhat a little bit of sophistry—well, let us—at the time you were writing for Jackson, did you believe that *Plessey* should have been struck down?

Justice REHNQUIST. I had not come to rest on that, Senator. I thought about it, and perhaps if I had stayed, if the case had been decided in the term I was there and I had seen circulating drafts, I would have come to a firmer conclusion than I now recall coming to.

Senator BIDEN. Mr. Justice, you know—you do not remember back as to that time, whether you had an opinion as to which way you would have ruled if you had been a judge? I mean, you are a clerk. I know as a young lawyer, just advising a senior partner, I had pretty firm views. I was not sure I was right or wrong, but I had pretty firm views about things that I thought that I had delved into deeply.

Obviously, the senior partner knew a great deal more about the case than I, but after doing hundreds of hours of research, as I am sure you did, hundreds of hours of research on this, I arrived at a conclusion in my mind. It maybe has changed in subsequent times, but at the moment, this was a question of phenomenal moment for the country, and it was realized as being such even during the time Vinson was alive, in the first term it was argued.

And are you telling me that you do not recall what your view was, nor did you form a view, as to whether or not the plaintiffs in *Brown* were correct in the case as argued before the Court when you were a clerk, sitting there at the same time the Court heard the decision?

Justice REHNQUIST. I have told you everything I recall about my views then, Senator.

Senator BIDEN. Would you tell me once more, then. I must have misunderstood them.

Justice REHNQUIST. Yes; that I thought *Plessey* had been wrongly decided at the time, that it was not a good interpretation of the equal protection clause to say that when you segregate people by race, there is no denial of equal protection.

But *Plessey* had been on the books for 60 years; Congress had never acted, and the same Congress that had promulgated the 14th amendment had required segregation in the District schools.

Senator BIDEN. Therefore, you—is it reasonable—let us try to finish that thought. If you got that far, then it seems your conclusion must have been that it was the Congress' business, not the Court's, to change *Plessey*?

Justice REHNQUIST. Senator, I do not think I reached a conclusion. Law clerks do not have to vote.

Senator BIDEN. No, but they surely think.

Justice REHNQUIST. Yes, they do.

Senator BIDEN. I'll be darned. OK. Let me move on.

If you had been Justice Reed, with the obvious doubts which I am sure were known the first time the case was argued, clearly the second time the case was argued, if you had been Reed, holding the views that he did, would you have changed your position to make it a unanimous decision?

Justice REHNQUIST. I just do not think I can put myself in the position of Justice Reed. I think you can certainly say that he performed a service in doing what he did, and yet I do not think you can say that every time, even in a very important case, the Court stands 8 to 1, that you nonetheless ought to alter your view.

Senator BIDEN. No; I am not suggesting that. I am just talking about that specific case. I mean, it is not like, Mr. Justice, I am picking a case that you are not familiar with, and were not familiar with at the moment it was being discussed.

I know, for example, I have four former Supreme Court clerks who helped me prepare for these hearings. And all four of them remember with great pride and incredible clarity those decisions of moment that they participated in for their Justice at the moment. It is something a little bit like saying, "I was in the campaign of 1952 with Ike when he made the speech." It is the nature—those are things you do not often forget.

You were one of nine young women and men chosen in all of America to sit in what we lawyers know is the single most prestigious job you can be offered coming out of law school. And that is why it kind of surprises me that you did not have a firmer view of where the thing was or was going. That is——

Justice REHNQUIST. I was 1 of 18 men chosen at that time.

Senator BIDEN. Well, 18, not 9—I am sorry.

Justice REHNQUIST. And I might add, Senator, that things came to a stop so far as working on any drafts, I believe, the year I was there after the oral argument. It was not the kind of a situation where you would have followed the case through, seen the drafts circulate, see the opinion finally come down.

Senator BIDEN. It was also not one of those cases anybody felt was going to go away, was it?

Justice REHNQUIST. No, no, it was not.

Senator BIDEN. No. Let us move on for a moment, if I may. Let us take the flipside of this now, the Nixon tape case, which has been mentioned by Judge Bell and by me and by the chairman and others.

In the Nixon tapes case you had, in a strange sense, the reverse. You had a Chief Justice who had doubts about the wisdom of the decision as finally decided—the light is on.

The CHAIRMAN. One more minute.

Senator BIDEN. Well, why don't I reserve that. I will come back to Nixon later. He is back to us, so we might as well go back to him later. He waited long enough. I can wait. [Laughter.]

Thank you very much, Mr. Justice. I will do it in my next round.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. Justice Rehnquist, let's see if we can forget about all these other people in the room and just talk to each other as one lone dissenter to another, I have noticed the proliferation of dissenting opinions in the Court in recent years. Many very important cases that addressed crucial issues have been decided by coalitions of one sort or another in the Court. One side effect of these shifting coalitions has been a proliferation of individual views, which make it a little more difficult for Court watchers to analyze what is in fact the true judgment of the Court.

Do you think that this spate of individual opinions impedes the Court in carrying out its constitutional responsibilities?

Justice REHNQUIST. To a certain extent, Senator, I think I would have to say yes, although I am sure I have been a contributor on occasion, as have all nine of us, to what you refer to as something of a proliferation of individual opinions.

One of the previous witnesses—it may have been Mr. Lane—made the statement that when the Court comes up with a plurality opinion, or with a Court opinion in several concurring opinions, it just is not clear to judges in lower courts and perhaps to lawyers exactly what the law is. And that cannot be a plus.

There is a great tendency to feel—and I felt it myself, and I have followed the tendency myself, although I must say I try to restrain it lately—that so-and-so who is writing the Court opinion has not said it quite the way I think it should be said, and therefore, I will write this little concurrence; it will not harm anybody. Well, in fact, it does tend to muddy the message a little bit.

So I agree with you it is regrettable.

Senator MATHIAS. Those are temptations that are not exclusively present in the Supreme Court. We not only have the temptations here, but we succumb to them a good many times.

Is there anything that a Chief Justice can do in order to temper this problem?

Justice REHNQUIST. Senator, the Chief Justice can cajole or urge, as Chief Justice Warren did Justice Reed, but I have a feeling that when you get to the ordinary kind of case that it does not work very often.

I think one thing the Chief Justice can surely do is lead by example. That is, if the Chief Justice makes it a practice of not writing separately, except when he feels it is absolutely necessary, I think that then the Chief might have some weight in speaking to someone else and saying, "Look, do you really need to say this?" But if the person spoken to has the feeling it is the pot calling the kettle black, they will not get anywhere.

Senator MATHIAS. Do you think that is the basis of the questions that have been raised about your nomination? I believe it is Joe Rauh who has awarded you the title of "the all-time champion lone dissenter" He has implied that that record will make your leadership less effective.

Justice REHNQUIST. And you would like me to comment on it? [Laughter.]

Senator MATHIAS. What do we tell him?

Justice REHNQUIST. I will be happy to comment, Senator. It is rather easy to put together statistics showing A, B, C, or D if you choose the right year. I think certainly the early days of my tenure on the Court, I filed, quote, "lone," closed quote, dissents probably more often than any of my colleagues except Justice Douglas.

I think in the past 5 years, the statistics indicate that my colleague Justice Stevens has filed lone dissents more than I have. And I think that is an interesting example, because no one would contend that Justice Stevens is on either the right or the left wing of the Court; he is regarded as a centrist. And yet he has filed more lone dissents than anyone else. Sometimes it is not that you are way over on one side, but you may just disagree with the way the Court has reasoned through a rather fine point.

So I think if one were either in lone dissent or in dissent with two or three other people very, very frequently, it probably would have an effect on how you are able to perform as Chief Justice. But the statistics I have just referred to, it seems to me, indicate that I should not have any great problem.

That does not mean there will not be an occasional lone dissent.

Senator MATHIAS. As Senator Biden has observed, you are already a member of the Supreme Court. Thus, are not discussing whether you should join the Court. We are really just here to talk about what chair you will sit in. The chair to which you have been nominated, of course, is one which is the seat of leadership of the entire judicial branch of Government.

Chief Justice Burger has highlighted this aspect of the Chief Justice's role during his tenure. He has devoted a lot of energy and a lot of time to the administration of justice. As result, the Judicial Conference, of which the Chief Justice is the chairman, is stronger. It is more active on issues of concern to the whole Federal bench. The Federal Judicial Center has enhanced the judicial branch's capacity for research and training. Chief Justice Burger in his statements on judicial compensation, on the litigation explosion, on competency of courtroom advocacy, just as a few examples, has articulated the concerns of Federal judges and of a great many State and local court judges.

How do you view this particular aspect of the role of the Chief Justice? What thoughts can you share with us as to how you would approach the administrative and leadership role?

Justice REHNQUIST. I view it as a very important aspect of the role of the Chief Justice, Senator. Chief Justice Burger will be a hard act to follow in that respect, because certainly, no Chief Justice has ever devoted the attention to the sort of things you have just described as he has. But I do not think it is something that ought to be regarded as kind of an idiosyncracy of his, because I think that the lower Federal court judges, State court judges, have really felt that he was speaking for them on many occasions, calling problems of the profession or of the Judiciary to the attention of Congress or of the profession in the way a highly visible spokesman can, but in a way that a multitude of less visible spokesmen cannot.

I think the Chief Justice is going to have to keep on in that role, and I think it is a very important one.

Senator **Mathias**. Is it your intention to continue that kind of active leadership in this field?

Justice **Rehnquist**. Yes; as I say, the Chief's act is a hard one to follow, but I would certainly do my best if the Senate confirms me.

Senator **Mathias**. In your judicial career, you have been interested in the subject of federalism and the division of powers between the national government and the State government. There is a new development in federalism about which I would like you to comment.

It has become increasingly common for a State court which is considering a case that affects individual rights, to base its decisions on the State's constitution, even though the pertinent provision of the State constitution may exactly parallel a provision in the Federal Constitution. The search and seizure cases provide a good example. It appears to some legal commentators that the State courts are getting more active in the areas in which the Supreme Court has cut back on the scope of the protections that it previously found to exist in the Federal Constitution.

Have you observed this development? What thoughts do you have about it?

Justice **Rehnquist**. I have, Senator Mathias, and I think that is just the way the system should work. The Federal Constitution certainly lays down one rule for all 50 States, and if some States want a more stringent prohibition against searches and seizures than that provided by the fourth amendment, it just makes sense that they ought to have it. If some States are content with the Federal provision, which everybody has to live up to, it seems to me that makes sense for them to have that. I think it is a very healthy development.

Senator **Mathias**. So you would view the protections in the Federal Constitution as the floor and not as the ceiling?

Justice **Rehnquist**. Oh, absolutely.

Senator **Mathias**.You do not feel that that is a challenge to the Court's preeminence as the final arbiter of the law of the land?

Justice **Rehnquist**. No; I do not think the Court is necessarily the final arbiter of the law of the land. It is the final arbiter of the U.S. Constitution and of the meaning of Federal statutes and treaties. But we still live in a somewhat pluralistic society where the States' highest courts are the final arbiters of the meaning of their State constitutions. That is just as it ought to be, I think.

Senator **Mathias**. What about the charges that the Supreme Court has become anti-Federalist in certain instances. There are a number of cases in which the Court has upheld actions by State officials which the State courts had struck down on fourth amendment grounds or on some parallel State constitution grounds. What deference should the Supreme Court give to decisions of the State courts interpreting Federal constitutional provisions?

Justice **Rehnquist**. Speaking generally, Senator, and of course, that is the only way I can speak in response to a question like that, because——

Senator **Mathias**. We are speaking in very general terms.

Justice **Rehnquist**. Yes; the same type of deference as the Supreme Court gives to decisions of lower Federal courts interpreting the U.S. Constitution. The decision is obviously entitled to weight, but if it does not fully square with precedents from the Supreme Court then it probably, if brought up, should be overturned.

Senator **Mathias**. What about State courts interpreting State constitutions that are at odds with Federal precedents?

Justice **Rehnquist**. That was the question I believe you brought up a moment ago, and that is every bit their privilege. But it is when State courts say this conviction should be reversed not because it offends the State constitution, but because the search offended the fourth amendment; that, of course, is a Federal question, and the final authority on Federal questions like that is the Supreme Court of the United States.

Senator **Mathias**. Now looking at another development in the court system, since you and I began the practice of law there have been a lot of changes. Some of them are quantitative. In those days, we had just a few dozen appellate judges in the country. Today there are hundreds. The caseload numbers have also climbed substantially. These quantitative changes have probably resulted in some qualitative changes as well.

Some would say that Federal judges today perform a job that is more bureaucratic than it has ever been. With the flood of litigation, judges are at least proportionately more managers than they are decisionmakers.

What is the future of the Federal courts? Do you see more litigation and larger caseloads? Will we respond with the appointment of still more judges, and create a larger judicial bureaucracy? If so, can we continue to maintain the concept of a single Supreme Court with nine individuals ultimately resolving issues that work there way to the top of the pyramid?

Justice **Rehnquist**. That is kind of a tall order. Let me go immediately to the multiplication of Federal judges. This is a concern which has been voiced by me in the past, by Judge Rubin of the fifth circuit, by Judge Higginbotham of the fifth circuit. It is a very real concern to anyone interested in the Federal judiciary. The Federal judiciary obviously does not pay comparably to what a lawyer with a substantial practice in a good-sized city would make. And so the attractiveness of the job and the ability of the Federal courts to get first-rate lawyers has got to depend on the—prestige sounds somewhat like it is a social thing—but the significance of a Federal judgeship and the sort of work that Federal judges do, how interesting is it. To the extent that the Federal judge is no longer trying cases, deciding motions and that sort of thing, but simply reviewing what subordinates do, I think the job is going to be less attractive.

There will always be plenty of people lined up for Federal judgeships, but the question is are they the people that you want to have Federal judgeships.

Senator **Mathias**. Should we be thinking about structural changes in the court system?

Justice **Rehnquist**. I think we should be thinking very definitely about a national Court of Appeals or an intercircuit tribunal, as I indicated to the chairman when I answered his question.

I think some more thinking is going to have to be done, and to me, this is the area in which the next Chief Justice could devote some attention not with the idea that I am bringing in some ideas that I know exactly what ought to be done, but let us get some people to sit down and look and think about what is going to be done.

Senator **Mathias**. Well, the interaction between the next Chief Justice and this committee will be very important.

Justice **Rehnquist**. I should think it would be extraordinarily important.

Senator **Mathias**. Although I will not be here, I invite you, on behalf of my colleagues, to keep in close touch.

Justice Frankfurter once wrote:

> The judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussion at conference. Without adequate study there cannot be adequate reflection; without adequate reflection, there cannot be adequate discussion; without adequate discussion, there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions. It is, therefore, imperative that the docket of the Court be kept down so that its volume does not preclude wise adjudication.

That sounds like an almost utopian formulation for the Court. However, during the preceding term, the Court issued 146 signed opinions after reviewing a docket bulging with 5,158 cases. These figures seem overwhelming to an outsider.

Does that volume of cases preclude wise adjudication? I know there is some dispute on this. Chief Justice Burger contends very strongly that it does, that the Court is greatly overburdened, but some other members of the Court do not seem to have the same view. I wondered what your thoughts were.

Justice **Rehnquist**. I do not agree with the Chief Justice on that point. I think that 20 or 25 years ago all the courts, State courts and Federal courts simply worked at a more leisurely pace, and it may very well be there was a little more time for ripening of ideas and that sort of thing.

But I just do not think with the kind of litigation explosion that we have had in the last 20 or 25 years courts should or really can aspire to go back to that. I think they have to work a little bit faster and quite a bit harder up to the point where you get to a certain point where you become kind of a bureaucracy, and you begin sacrificing all of the contemplative aspects. That is not good either.

But I think the 150 cases that we have turned out quite regularly over a period of 10 or 15 years is just about where we should be at. The certiorari cases, the number grows every year. I think you cited the figure 5,100 this past year.

They take time and the more of them there are the more time they take, but even 5,100 of them do not take a substantial minor fraction of the Court's time to dispose of, I do not think.

I think it would be on the order of somewhere 20, 25 percent of the Court's time spent disposing of certioraris, and I am just guessing, because I am guessing on the figures in my own chambers, and I really do not have any basis for saying how much the other chambers put in on certiorari.

Senator MATHIAS. Thank you very much, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Thank you very much, Mr. Chairman.

Welcome, Mr. Rehnquist. I would like to direct your attention to the issues that were raised after the end of our hearing back at the earlier consideration for your nomination to go on the Supreme Court, and this is related to the whole question of voter intimidation in Phoenix.

You remember these allegations came up after the conclusion of our hearings. Senator Bayh, Senator Hart, myself inquired of you about your own conduct and your activities on election day in the early 1960's.

At that time, Chairman Eastland chose not to reopen the hearings. We did receive responses to our questions but we never did have an opportunity to go through the various allegations and charges during the course of that hearing or any direct opportunity to inquire of you about those particular allegations and charges.

And it is my understanding, and these are quotes that are put in chronological order that are taken from the responses which you gave to us in the written questions that are included in the record.

Justice REHNQUIST. Senator Kennedy, I have a copy with me, if I might get that.

Senator KENNEDY. I do not think you will probably disagree with my summary. If you do, maybe you want to go back and look at it. I would like to just try to put the line of questions into some kind of perspective.

The CHAIRMAN. Excuse me just a minute. I might say this. If you wish to refer to any notes or books or anything before answering, you have a right to do that.

Justice REHNQUIST. Thank you, Mr. Chairman.

Senator KENNEDY. In 1971, you made the following statements about your involvement in election day activities:

> In 1958 I became involved in the election day program on quite short notice. Spent all the day at Republican county headquarters at Phoenix. In 1960 on election day, I believe that I spent most of the day in county headquarters. In that year, however, we had enough other lawyers available in county headquarters so that I probably spent some of the day going to precincts where a dispute had risen and attempted to resolve it.
>
> With respect to 1962 on election day, my recollection is that I spent most of the day in Republican county headquarters; however, I think that on several occasions in 1962 just as in 1960 I went to precincts where disputes had arisen in an effort to resolve them.
>
> With respect to 1964, my recollection is that on election day during this particular election I spent all of my time in county headquarters. In none of these years did I personally engage in challenging the qualifications of any voters.
>
> I have not, either in the general election of 1964 or in any other election, at Bethune precinct or in any other precinct, either myself, harassed or intimidated voters or encouraged or approved of harassment or intimidation of voters by other persons.

I believe as part of that record you actually signed an affidavit which says the following:

I have read the affidavits of Gordon Harris and Robert Tate, both notarized in Maricopa County. So far as these affidavits pertain to me, they are false. I have not either in the general election of 1964 or in any other election at Bethune precinct or in any other precinct either myself harassed or intimidated voters or encouraged or approved the harassment or intimidation of voters by other periods.

Signed William Rehnquist. November 17, 1971.

Do those statements refresh your recollection? Do you understand those to be correct statements?

Justice **Rehnquist**. I cannot recollect them. Were you reading from the document?

Senator **Kennedy**. Yes.

Justice **Rehnquist**. If that is from what I said in 1971 I think they are correct. Yes.

Senator **Kennedy**. Several witnesses have come forward and made statements about your activity as a leader in the Republican ballot security program in Phoenix in Arizona in the early 1960's.

We will hear, as I understand it—at least it has been requested we hear from Mr. Charlie Pine—who describes your activities at Bethune precinct in 1962 or 1964 as follows:

"I saw him there and I saw him approach at least one voter, if my memory is correct, two. He asked them, he said, 'Pardon me. Are you a qualified voter,' to this black gentleman. The man said, 'Yes.' And he said, 'Do you have any credentials to indicate that you are?' The man said, 'No.' And he said, 'Well, then perhaps there is a question of whether or not you are qualified.' And the man instead of standing in line, if he had advanced, by that time, he got to the voting table he would have found his name on the voting list, but he turned on his heels and left the voting precinct.

"I felt that the whole purpose of that was to discourage blacks from voting."

Do you know Mr. Pine? Charlie Pine.

Justice **Rehnquist**. I do not believe so, Senator. It has been a long time, some 20 years ago, but the name does not certainly ring a bell.

Senator **Kennedy**. Do you know any reason why he might make that statement?

Justice **Rehnquist**. Since I do not know him, I certainly do not know any reason why he would make that statement.

Senator **Kennedy**. Mr. Quincy Hopper has stated that he was at the Bethune school on election day 1964 and that you were there at the school having voters read from the Constitution to test for literacy. Do you know a Mr. Quincy Hopper?

Justice **Rehnquist**. No, I do not, Senator.

Senator **Kennedy**. Do you know any reason why Quincy Hopper would make that statement?

Justice **Rehnquist**. No, I do not.

Senator **Kennedy**. Rev. Benjamin Brooks who is the pastor of the South Minister Presbytrian Church has stated that he is familiar with you. He saw you at the Julian precinct where Pastor Brooks was an inspector on election day, the year that Paul Fannin and Phil Morrison were running for Arizona Governor, and Reverend Brooks stated that on that day you challenged black, elderly working class voters for literacy by having them read the Constitution out loud.

Do you know Reverend Brooks?

Justice REHNQUIST. I do not believe so, Senator. No.

Does he say the year Bob Morrison was running against Paul Fannin?

Senator KENNEDY. Yes.

Justice REHNQUIST. Well, that would have been 1958, I think, which would be 28 years ago. No, I do not really think I do.

Senator KENNEDY. Dr. Sidney Smith, who was a psychology professor at Arizona State University from 1947 to 1964 stated that he served as a poll watcher in the early 1960's. Dr. Smith states that on election day in 1960 or 1962 as a poll watcher at Southwestern Phoenix poll he saw you arrive with two or three other men.

He says he recognized you from political functions and was positive of his identification. Dr. Smith states that you approached a group of voters holding a card in your hand and said, "You cannot read, can you? You do not belong here."

Dr. Smith says the voters were intimidated by your actions. Do you know a Dr. Smith?

Justice REHNQUIST. I do not believe I do, no.

Senator KENNEDY. Mr. James Brosnahan, a prominent San Francisco attorney, former assistant U.S. attorney in Phoenix stated that on election day 1962 he received complaints of voter harassment at polling places. The complaints were that Republican challengers were challenging voters on the grounds that they could not read.

He went to a precinct with an FBI agent. You were sitting at a table where the voter challenger sits. A number of the people complained to Mr. Brosnahan that you had been challenging voters.

Do you know Mr. Brosnahan?

Justice REHNQUIST. Yes, I do.

Senator KENNEDY. Did you engage in any of these activities, Mr. Rehnquist?

Justice REHNQUIST. Would you read me again what Mr. Brosnahan says that I did.

Senator KENNEDY. He said he went to a precinct with an FBI agent and you were there sitting at a table where the voter challenger sits, and a number of people complained to Brosnahan that you had been challenging voters.

Justice REHNQUIST. No, I do not think that is correct.

Senator KENNEDY. Well, are any of the other statements that I just read correct.

Justice REHNQUIST. No, I do not believe they are.

Senator KENNEDY. Would you not remember something like that if it had happened?

Justice REHNQUIST. I would think I would, yes.

Senator KENNEDY. Are all these witnesses wrong?

Justice REHNQUIST. Well, Senator, I gave my best recollection in 1971. I reviewed that statement, and that stands as the best of my knowledge. So I suppose if they say I did something that I have said I did not do, I would have to say, yes, they are wrong.

Senator KENNEDY. Why would the witnesses, do you think, make these statements, all of them make these statement relatively similar in nature about your activity on election day? What is their motivation, do you think?

Justice REHNQUIST. Really do not know.

Senator KENNEDY. Do you think they are all mistaken or what?

Justice REHNQUIST. I think they are mistaken. I just cannot offer any further explanation.

Senator KENNEDY. Whose idea was the ballot security program?

Justice REHNQUIST. I do not think the ballot security program as you refer to it took on that name until 1964. Before that I think it was just called poll watching or challenging. I have no idea whose it was.

Senator KENNEDY. I gather from your response to my questions that you deny categorically that you were engaged in any of these activities that are identified by any of these individuals in any of the polling places that were mentioned.

Justice REHNQUIST. When you refer to these activities, Senator, that may cover a lot.

Senator KENNEDY. Just the ones I read about.

Justice REHNQUIST. Would you read them to me again?

Senator KENNEDY. Well, we first have Mr. Pine. Your activities in Bethune precinct 1962 or 1964. "I saw him there. I saw him approach at least one voter, if my memory is correct, two. He asked them. He said, 'Pardon me. Are you a qualified voter' to this black gentleman. And the man said, 'Yes.' And he said, 'Do you have any credentials to indicate that you are?' And he said, 'Well, then perhaps there is a question of whether or not you are qualified.' And the man, instead of standing in line, he had advanced. By the time he got to the voting table, he would have found his name on the voting list, but he turned on his heels and left the voting precinct. I felt the whole purpose of that was to discourage blacks from voting."

Justice REHNQUIST. Yes, I do deny that.

Senator KENNEDY. And Mr. Quincy Hopper stated that he was at the Bethune school on election day and that you were there at the school having voters read from the Constitution to test for literacy.

Justice REHNQUIST. Yes, I do deny that.

Senator KENNEDY. And Benjamin Brooks, the pastor of South Minister Presbyterian Church stated that he is familiar with you. He saw you at the Julian precinct where Pastor Brooks was the inspector on election day that Paul Fannon and Morrison were running. Reverend Brooks states that on that day you challenged black elderly working class voters for literacy by having them read the Constitution outloud.

Justice REHNQUIST. I deny that.

Senator KENNEDY. And Sidney Smith, Dr. Smith, psychology professor at Arizona State from 1947 to 1964 stated he served as a poll watcher in the 1960's. Smith states that on election day in 1960 or 1962, a poll watcher at a southwest Phoenix polling place observed you arrive with two or three other men. He says he recognized you from political functions, positive of his identification.

He states that you approached a group of voters holding a card in your hand and said, "You cannot read, can you? You do not belong here." Dr. Smith says the voters were intimidated by your actions.

Justice REHNQUIST. I am sure he is mistaken as to the latter part. It is perfectly possible that I could have arrived at a southwest Phoenix polling place with a couple other people, and again, I gather he is not definite as to the years, because one of my jobs as notice reading what I said in 1971 and recalling as best I can now, was to go to polling places where our challenger was not allowed into the polling place or if a dispute came up as to something similar to that, either I or along with my Democratic counterpart would go.

So it is not at all inconceivable that I would have been with a group of two or three other people going to a southwest Phoenix polling place in whatever year that was. But the later part is false.

Senator KENNEDY. Well, the activity described basically is personally challenging voters. That is the activity alleged, and you categorically deny ever having done that in any precincts in the Maricopa County in the Phoenix area at any election, is that correct?

Justice REHNQUIST. I think that is correct.

Senator KENNEDY. Well, what is "I think." I mean you would remember whether you did or not. Harassing or intimidating voters is not something you are going to forget.

Justice REHNQUIST. Senator, let me beg to differ with you on that point, if I may. I thought your question was challenging. Now you say harassing or intimidating. As to harassing or intimidating, I certainly do categorically deny anytime, anyplace.

If you are talking about challenging, I have reviewed my testimony, and I think I said I did not challenge during particular years. I think it is conceivable that 1954 I might at least have been a poll watcher at a westside precinct.

Senator KENNEDY. Well, did you challenge individuals then?

Justice REHNQUIST. I think it was simply watching the vote being counted.

Senator KENNEDY. Then you did not challenge them?

Justice REHNQUIST. I do not think so. But a challenge——

Senator KENNEDY. Well, you would remember whether you challenged them now, Mr. Justice, would you not? Did you at any time challenge any individual?

Justice REHNQUIST. A challenger, Senator, was someone who was authorized by law to go in the polling place and frequently the function was not to challenge but to simply watch the poll, watch the vote being counted.

Senator KENNEDY. Well, that is fine. I mean, as I understand your testimony, you said you were a poll watcher. A challenger has a different connotation or activity.

Justice REHNQUIST. But to be a poll watcher at that time, I think you had to be a challenger.

Senator KENNEDY. Well, have you ever personally challenged any individual in any precinct?

Justice REHNQUIST. I do not think so.

Senator KENNEDY. Well, you would know it, would you not, if you did?

Justice REHNQUIST. I am not entirely sure. I cannot recall ever challenging any person, but you are talking about a period——

Senator KENNEDY. Well, these people might be——

The CHAIRMAN. Let him get through his answer.

Justice REHNQUIST. No. I have responded in each case that you said to say that I did not agree with it, but if you are asking me whether over a period from 1953 to 1969 I ever challenged a voter at any precinct in any election, I am just not sure my memory is that good.

Senator KENNEDY. Well, your affidavit says I have not either in the general election of 1964 or in any other election, in any other election. That is what your sworn affidavit was in 1971.

Justice REHNQUIST. What does the rest of the affidavit say?

Senator KENNEDY. In any other election at Bethune precinct or in any other precinct either myself harassed or intimidated voters or encouraged or approved harassment or intimidation of voters by any other person.

So you might have challenged them but you did not intimidate or harass them is what I should conclude.

Justice REHNQUIST. Well, I answered all your questions the best I can.

Senator KENNEDY. Were you aware that Mr. Brosnahan indicates the decision was made not to prosecute any of the activities in terms of challenging various voters in the precincts in Maricopa County that there was a consideration for prosecution of these kinds of ballot law activities? Were you ever aware that that was under consideration?

Justice REHNQUIST. I do not believe I was.

Senator KENNEDY. So you never knew that a prosecution for harassing or intimidating or challenging voters was ever being considered by the U.S. attorney at that time?

Justice REHNQUIST. My present recollection 24 years later is that no, I did not know it.

Senator KENNEDY. So you never participated in any meeting about how to handle these potential investigations or prosecutions by the assistant U.S. attorney?

Justice REHNQUIST. Not that I recall.

Senator KENNEDY. In 1971, a citizen of Phoenix, Clovis Campbell, a member of the State senate, gave an affidavit, that you told him in 1964, that you oppose all civil rights legislation. You denied this in writing. Do you know Senator Campbell personally, or, by reputation? Do you know any reason why he would give a false affidavit against you on this point?

Justice REHNQUIST. I have met Senator Campbell. I had met him in Arizona. No, I do not.

Senator KENNEDY. You opposed the Phoenix ordinance permitting blacks to go into stores, restaurants, and the like, in 1964, as I understand it. One of the statements of Clovis Campbell: in his affidavit he says that you told him that you oppose all civil rights legislation.

Can you think of any civil rights bill that you favored at that time, in 1964?

Justice REHNQUIST. It is difficult for me to think back that long. It seemed to me there was a Republican, or some Republican, some type of version of the, perhaps a precursor of the 1964 Civil Rights Act, that would have extended Federal coverage to interstate highways, and that sort of thing, and that had always seemed pretty sensible to me.

Senator KENNEDY. Well, it was the same year that Senator Goldwater supported the 1964 Civil Rights Act, here, in the U.S. Senate.

And as I understand, your recollection is that you supported some civil rights act dealing with interstate transportation? That was the one civil——

Justice REHNQUIST. Well, supported it is——

Senator KENNEDY. Well, how else——

Justice REHNQUIST. Well, you read about it in the paper. You think, you know, this might be a good idea.

Senator KENNEDY. Well, you were active, obviously, in the political swim at the time. This is not just a Joe Q. Citizen who is sort of out reading the newspapers up in Scottsdale. I mean, you were an active political figure there. You are aware, obviously, of the political debates and discussions that were taking place, and so we are not considering these in a vacuum.

You have got a State senator that said that you told him you opposed all civil rights legislation. You have denied that in an affidavit. You know of no reason, evidently, why Clovis Campbell would express that view in a sworn affidavit, and your response is, I understand, that you support, the best of your recollection you do support some civil rights bill that was being considered on interstate transportation?

Justice REHNQUIST. Well, Senator, if you mean by support, publicly announce in favor of, no.

Senator KENNEDY. Sure.

Justice REHNQUIST. No.

Senator KENNEDY. Well, you did not mind publicly announcing your opposition to the——

Justice REHNQUIST. Right. Because I had thought it was——

Senator KENNEDY [continuing]. Public accommodations provisions in Phoenix, and also writing about that, too. Is that correct?

Justice REHNQUIST. Correct.

Senator KENNEDY. You wrote about that in a newspaper. You went to a public hearing on that, and indicated your opposition. So you were involved, at least, in the debate and discussion about civil rights, to some extent. And my question is, as you were prepared to take a position in opposition to those particular provisions in 1964, by direct testimony and by writing the newspaper, and we have a State senator that says that you told him that you could not find any civil rights legislation you supported.

I am just asking you whether you, to the best of your recollection, can remember any? That is the question. Or whether we might be able to draw that Clovis Campbell might have been correct?

Justice REHNQUIST. Your question, Senator——

Senator KENNEDY. Well, I suppose it is a repeat. If you can think of any civil rights legislation that you——

Justice REHNQUIST. No, other than what I have said, I think that is it.

Senator KENNEDY. Could I just go to a different area, and this is with regards to the Jackson memorandum.

The CHAIRMAN. Senator, your time is up.

Senator KENNEDY. My time is up. Thank you.

The CHAIRMAN. The distinguished Senator from Nevada.

Senator LAXALT. Justice Rehnquist, what, exactly, was your political role in the early 1960's, in Arizona?

Justice REHNQUIST. Senator, recalling as best I can after this lapse of time, at some point there I was counsel to the Republican county committee.

Senator LAXALT. Was that on the State level or the county level?

Justice REHNQUIST. I think it was on the county level, but it might have been on the State level for a short period of time. I honestly cannot remember.

Senator LAXALT. Do you recall what you were charged with doing in that capacity?

Justice REHNQUIST. Giving legal advice to the county committee, I think.

Senator LAXALT. And part of that, I suppose, would relate to the eligibility of prospective voters?

Justice REHNQUIST. I would think so, yes.

Senator LAXALT. It is normal, isn't it, in any political contest to have challenges on the part of either party to determine the qualifications of people to vote?

Justice REHNQUIST. Well, the only State I was ever active in, really, was Arizona, and it certainly was normal there.

Senator LAXALT. And really, it would be part of essential political responsibility to make certain that the ballots that were cast were cast by eligible people?

Justice REHNQUIST. Yes. The statutes authorized challenges.

Senator LAXALT. And in Arizona, as is true in most States, there was an active program being conducted, I assume, by both parties?

Justice REHNQUIST. Certainly, but I think the Republicans were the first to get active, but I think the Democrats became active very shortly afterward.

Senator LAXALT. So, essentially, you were chairman of some type of political committee on a local level, intending to establish guidelines and have people out in the field to ensure that the conduct of that election was honest in terms of eligibility of voters?

Justice REHNQUIST. Yes. I am not sure that I was ever chairman of the entire program, even in Maricopa County, Senator Laxalt, and again, I would refer back to the statement I made in 1971, because my reflection, my recollection was a good deal more closer then than it is now. I think that I was chairman of the lawyers group which was active on election day, and before hand, doing the sort of things that you mentioned. I am not sure that I was ever chairman of the entire program, say, recruiting the challengers, and that sort of thing.

Senator LAXALT. There seems to be some sinister connotation to the word "challenger". That is a legal phrase, is it not, or, a legal word in connection with the mechanics by which——

Justice REHNQUIST. It certainly was in Arizona.

Senator LAXALT. And I know that it is in my State of Nevada. That is the precise term that is used to determine whether or not a given person is eligible, or not, a perfectly appropriate political procedure.

Justice REHNQUIST. Yes.

Senator LAXALT. Well, now, in connection with your own activities—and we were dredging up old, old material here, admittedly some 24 years ago, rather substantially explored in the 1971 hearing. Senator Eastland listened to some of the testimony and then concluded it, abruptly, in the minds of some of my colleagues. But at that particular time, 24 years ago, your capacity, I understand, was pretty much of a supervisor?

Justice **Rehnquist**. A supervisor of lawyers. I do not think I had responsibility for the overall program.

Senator **Laxalt**. And the mechanics I suppose would be that as these people arrived at the various precincts, indulged in by both parties, if there was a question concerning their eligibility to vote, they were challenged according to State law?

Justice **Rehnquist**. I think that is accurate, Senator. I think most challenges, when the program started out, were on the basis of residency. But again, let me repeat what I said to Senator Kennedy: that the usefulness of the challenger program, as I recall it, to the Republicans, was that it was the only way we could get a person in the polling place to watch what was going on. Because although State law provided for two persons of one party, and one person of another party to constitute the election board, that constituted, that ran the election, in some very heavily Democratic precincts, that person, the person on the election board, had to be a resident of the precinct. And we simply could not find, in some precincts, a Republican to be a member of the election board.

And so there would be a two-person or a three-person election board of the opposite party and the only way we could get someone who was of the Republican faith—if you want to call it that—into the polling place at all, to see that things went on as normal—was to put them in as a challenger.

Senator **Laxalt**. So that if you had indulged in that kind of activity—the point I am trying to get at is a distinction, and you attempted to draw it yourself, between challenging, perfectly legal, and harassment and intimidation which is improper and illegal.

Justice **Rehnquist**. Well, I agree with you a hundred percent.

Senator **Laxalt**. And you can categorically state here, that as far as harassment and intimidation is concerned, in none of these elections did you indulge, personally, in that kind of activity?

Justice **Rehnquist**. Yes, I have stated it in 1971, and I state it again now.

Senator **Laxalt**. And for that matter, not have it condoned by others, in behalf of your campaign effort?

Justice **Rehnquist**. Correct.

Senator **Laxalt**. Do you know a Charles Pine?

Justice **Rehnquist**. No. I do not.

Senator **Laxalt**. I might state to you, that he is the former Democratic chairman of the State of Arizona. Would that refresh your recollection?

Justice **Rehnquist**. Do you know when he was Democratic chairman?

Senator **Laxalt**. During that period. If you do not recall——

Justice **Rehnquist**. No, it still—I am sorry—it still does not refresh my recollection.

Senator **Laxalt**. Now James Brosnahan apparently was an assistant U.S. attorney and you have testified that you knew him?

Justice **Rehnquist**. Yes; that is correct.

Senator **Laxalt**. I might indicate to you, that in a quote that was given to the Baltimore Sun dated July 26, 1986, Mr. Brosnahan was quoted to this effect. Quote: "I recall William Rehnquist was there. I cannot say I saw anything, specifically, that he did." So the so-called Brosnahan position is not nearly as definite as it might appear.

Justice **Rehnquist**. Does the statement say where I was?

Senator **Laxalt**. I think they are referring to the Bethune precinct.

Justice **Rehnquist**. Oh.

Senator **Laxalt**. I think most of the inquiry is in connection with that particular activity. So, in summing up, once again, you can categorically state, that you did not engage in any campaign intimidation or harassment in connection with any of these elections in the State of Arizona?

Justice **Rehnquist**. Yes, I can, Senator.

Senator **Laxalt**. Let me change direction, if I may, for a moment or so. Why do you believe that you are qualified to be Chief Justice of the U.S. Supreme Court?

Justice **Rehnquist**. I guess the first qualification I feel I have is nearly 15 years service as an Associate Justice which enables me to, or I hope will enable me to perform a large part of the Chief's responsibilities without having much difficulty getting started. I have sat at the conference table for 15 years, and I know how conference discussions go. I know the procedural niceties which any institution has, which may not be terribly important, but they are the way any institution works, and someone coming in from the outside and getting used to the—it just takes a while to get used to how things are handled. So, I think that is a valuable experience.

And I think 15 years of getting to know the other eight people, although I of course have not known all of them for 15 years, is a very valuable asset. It will not be a group of strangers to me, obviously.

And I also think—perhaps I am being immodest—that I have a very real interest in the Federal judicial system and the American judiciary. I have a great interest in the Supreme Court and its work. But I have a very great interest in trying to see improvements made, not just in the lower Federal courts, but seeing what might be done through the Center for State Courts, in helping State courts, at least getting financial assistance to them without trying to tell them what to do.

Senator **Laxalt**. Don't apologize for being modest around here. I do not think it is the place for it. You know, it has been stated here, in rather strong terms by the opposition during the last several days, that the Chief Justice is vested with awesome power, and it has been stated, almost categorically, that the Chief Justice, procedurally, under this Court, and perhaps historically—I do not know—literally has the power of life and death over the matters that the Court will consider. Is that true?

Justice **Rehnquist**. Senator, I think the position of Chief Justice is an awesome position just because it is the No. 1 judicial position in the United States of America. I do not think it is because of the awesome power, that the Chief Justice possesses. I tried to indicate, in answer to the Chairman's question, and in answer to Senator Mathias's question, that the Chief's prerogatives in the conference, the prerogative of assigning opinions, and the prerogative of leading conference discussion, while important, are seldom, if ever, ones that he can use to foist his judicial ideas, his jurisprudential ideas, off on an unwilling colleague.

But it is because it seems like, with the increasing caseload of all the courts, that we are looking at real problems, and not just in the Supreme Court, and not just in the Federal judiciary, but in the entire American judicial system. And the Chief Justice is a visible spokesman for those concerns. That I think it is an awesome responsibility.

Senator Laxalt. Let me draw a rough parallel. Does the power of the Supreme Court, the Chief Justice: is it akin to the power of a majority leader in the United States Senate? Are you going to be able to designate the business that the Court is going to handle? Or mechanically, help us. Do you arrive at that through a consensus? What is the procedure by which the Court determines what pieces of major litigation it is going to consider?

Justice Rehnquist. The Chief Justice, Senator, has been referred to as primus inter pares, the first among equals, and I have a feeling, from the way you described the power of the majority leader, that he is a good deal more equal than the majority leader. The Court, by vote, grants certiorari in a case to bring it up for review. It takes four votes in the conference to bring the case up for review.

The Chief cannot bring a case up for review himself. The cases are generally placed on the docket in the order in which certiorari has been granted. So the Chief, as far as I know, has no particular power in deciding, well, we will hear this case out of order, or, we will hear these cases because I want to hear them, even though they were filed later.

It is all, so far as I know, virtually a mathematical thing, in the order in which the cases are granted. So, the Chief has virtually no control, singlehandedly, over the cases the Court will hear, or the order in which it will hear them.

Senator Laxalt. There have been some questions raised, also, Justice Rehnquist, in connection with your positions, historically, and perhaps currently, in the broad areas of civil rights and in the broad areas of women's rights.

Do you carry with you, at the present time, or have you, historically, some kind of bias in the area of civil rights?

Justice Rehnquist. No, I do not, Senator. No, I do not.

Senator Laxalt. Is there any rational connection between your positions, historically, on some civil rights legislation in cases before the Court, that would establish with some validity, or credibility, a claim that you are less than impartial when a civil rights matter comes before the Court?

Justice Rehnquist. I do not think that claim can be credibly made, Senator. I think that the constitutional positions I have taken in some cases involving the equal protection clause, have resulted in less favorable rulings, or votes on my part, for women's rights issues, and for some issues involving blacks, and other minorities, than would a broader construction of the equal protection clause.

But I have taken the same position on the equal protection clause with respect to corporations. It is nothing peculiar to the fact that blacks, and minorities are invoking it. It is simply the fact that I read the equal protection clause, giving it the best interpretation I know how, somewhat more narrowly than some of my colleagues.

Senator **Laxalt**. And that has been historically your position, certainly in the area of women's rights?

Justice **Rehnquist**. I think it has.

Senator **Laxalt**. Well, tell me: do some of the women's groups that we have been hearing the last several days have cause to fear lest Justice Rehnquist becomes the Chief Justice of the Supreme Court? Are women going to be prejudiced, or people who are involved in furthering feminist causes going to be prejudiced by your being confirmed?

Justice **Rehnquist**. I do not believe so, Senator. The Congress has taken over a great deal of the protections of women's rights, and things like title VII of the Civil Rights Act.

And I authored an opinion for the Court just this past June, I think, the *Meritor Savings* case, where we held that harassment in the workplace was the responsibility of the employer, even though not performed directly by the employer. It certainly was regarded, I think, as a victory for the cause that you are talking about.

Senator **Laxalt**. So what you are saying, essentially, if I hear you correctly, is that you do not carry into these cases, or into the Court, or into your new position, any blatant historical or other bias in these very, very important areas?

Justice **Rehnquist**. Well, I hope no bias, blatant, or otherwise, Senator.

Senator **Laxalt**. And I gather what you say is, that your interpretation, particularly of the 14th amendment, as it applies in the area of women's rights, and also civil rights, just from the standpoint of legal philosophy differs from some?

Justice **Rehnquist**. Yes. It does.

Senator **Laxalt**. And that essentially is the line of difference, and it is ideological, rather than your carrying any bias in?

Justice **Rehnquist**. Yes, it is, Senator.

Senator **Laxalt**. And bottom line, Americans need have no concern lest Justice Rehnquist be elevated to the highest legal position in the land, on the basis that a standard would be uniformly applied to mete out equal justice to all Americans?

Justice **Rehnquist**. I think and believe that you are right.

Senator **Laxalt**. I thank the chairman. I thank the Justice.

The **Chairman**. Thanks very much, Senator. We are going to take a 10-minute recess, and I want to make this announcement at this time. We will hear from approximately 10 individuals who allege Justice Rehnquist intimidated voters in the 1960's. These witnesses will be invited to appear before the committee on Friday morning at 8 a.m., and this hearing will adjourn at 1 p.m., Friday. We will go as late as necessary tomorrow night, all night, if necessary, to finish everything with these witnesses from Arizona, and we will finish them by 1 o'clock, Friday. I am prepared to go as late as necessary tonight, and tomorrow night, as I stated, but I intend to conclude these hearings on Friday, as stated.

Senator **Biden**. Mr. Chairman.

The **Chairman**. Yes.

Senator **Biden**. Mr. Chairman, would you share with the rest of the committee the magic of 1 o'clock on Friday as opposed to 4 o'clock on Friday, or 12 o'clock on Friday.

The **Chairman**. Well, a good many of the members have made engagements, and this is the second day of the hearing, we have got a third day tomorrow, and Friday, at 1 o'clock will be the fourth day. I think that is long enough. And I would admonish the members now: it is not necessary to duplicate.

If I have asked him questions and he has answered, or if you ask him questions he has answered, Senator Biden, it is not necessary for some other member to go on and harangue him, and ask him over and over again.

Senator **Biden**. I do not think Senator Laxalt was duplicating by the fact that he repeated the same things. I did not view that as duplication.

The **Chairman**. I think he was trying to clear up what Senator Kennedy did. We will now take a 10-minute recess.

[Recess.]

The **Chairman**. The committee will come to order. The distinguished Senator from Ohio.

Senator **Metzenbaum**. Thank you, Mr. Chairman. Mr. Justice, I think it is important that we put this show back on the right track, because my distinguished colleague from Nevada got into the issue of whether there was harassment, intimidation, or whether all you did was challenge, which is legal.

I want you to understand that this is not the issue. The issue before this committee, in this Senator's opinion, is whether or not Justice Rehnquist appeared before the committee in 1971 and stated the facts, and whether you are being factually accurate today in representing what those facts are.

Now the question of whether it was harassment, or intimidation, or challenge, is really irrelevant, because in 1971, you wrote: "In none of those years did I personally engage in challenging the qualifications of any voters."

And so the issue then is: did you take any action that either was challenging, and harassment and intimidation would certainly be over and beyond that? I think it is a fact that you told the committee, in 1971, that you spent most of your time on election day in 1962 at party headquarters, only going to precincts, quote, "where disputes had arisen, in an effort to resolve them." Do you remember that?

Justice **Rehnquist**. I do not presently recall it that accurately, but if that is what I said in 1971, I certainly stand by it.

Senator **Metzenbaum**. Did you ever approach any voters during this period about which we are speaking, in the polling booths, and speak to them regarding their qualifications to vote?

Justice **Rehnquist**. No. I do not believe I did.

Senator **Metzenbaum**. Did you ever ask a voter any questions regarding his, or her, qualifications to vote?

Justice **Rehnquist**. In the process of challenging them?

Senator **Metzenbaum**. In the matter of being in a voting booth. In a voting booth, around a voting booth.

Justice **Rehnquist**. No, certainly not in a voting booth.

Senator **Metzenbaum**. Did you do it at any time?

Justice **Rehnquist**. Not that I can recall.

Senator **Metzenbaum**. Now, as I understand it, this man, Charles Pine, was the Democratic chairman at that time. You have no recollection of ever having met him, or ever having known him?

Justice **Rehnquist**. It certainly does not come back to me at this time, in 1986.

Senator **Metzenbaum**. There is a man by the name of Arthur Ross, now a deputy prosecutor in Honolulu. He told the FBI that he saw you, and others, in 1962, with a card which had on it a constitutional phrase, asking prospective voters to read from it before entering the polls. Do you have any recollection of ever having done that? Did you ever do it?

Justice **Rehnquist**. Did I ever ask a voter to read from a card? No. I do not think I did.

Senator **Metzenbaum**. I am told that I used the word polling booth before instead of polling place. Would your answer have been any different, if I had used the word polling place?

Justice **Rehnquist**. To what question?

Senator **Metzenbaum**. With respect to whether or not you had asked people concerning their qualifications, being qualified to vote?

Justice **Rehnquist**. My answer would be the same.

Senator **Metzenbaum**. Did you ever ask a prospective voter to read from any text, whether the Constitution, or otherwise?

Justice **Rehnquist**. Not that I recall.

Senator **Metzenbaum**. Nelson McGriff filed an affidavit with the committee, stating: "I remember a challenger at the Bethune precinct some years back. I went in to vote, and there was this man challenging people to vote. As each person in front of me would give their name, this man would say 'I challenge you' to some of the people. He would stop them in line and give them a card to read about the Constitution. I think there was a fight, as this man looked roughed up. He was taken to a police car. I have now seen pictures of this man in the newspapers, and if this isn't the man, William Rehnquist, who is running for the Supreme Court, then it was his twin brother." That man's wife filed an affidavit saying: "I saw two policemen taking a man out of the voting place. The two policemen escorted him to a car. No other challengers were at the polls when I voted. I have now seen a picture of this man. It just looked like the man they were taking out of the polling place. This picture is of William Rehnquist and he does look like the same man I saw at Bethune precinct."

Are they wrong?

Justice **Rehnquist**. They are certainly wrong, yes.

Senator **Metzenbaum**. Jordan Harris filed an affidavit, stating: "I was present as a deputized challenger for the Democratic Party in Bethune precinct, a predominantly black precinct. I met the party challenger for the Republican Party, Mr. William Rehnquist, because I noticed him harassing, unnecessarily, several people at the polls, who were attempting to vote. He was attempting to make them recite portions of the Constitution and refused to let them vote until they were able to comply with his request. I know that this man was Mr. Rehnquist because the election board introduced me to him as a challenger for the Republican Party." Is he wrong?

Justice **Rehnquist**. Yes.

Senator **Metzenbaum**. Finally, Mr. Robert Tate submitted an affidavit, stating: "I was present at Bethune precinct, a predominantly black precinct. Mrs. Miller had come to cast her vote at Bethune precinct. She was encountered within the 50-foot line by William Rehnquist and requested to recite the Constitution. Mrs. Miller came to me crying, stating that Rehnquist wanted her to recite the Constitution. I looked around and saw William Rehnquist and Mr. Harris, struggling. I now remember him from pictures I have seen, lately, in the papers, as the same one involved in the above incident at Bethune precinct. He did not at the time, however, wear glasses."

Are all of these people stating untruths?

Justice **Rehnquist**. The ones that you have referred to, yes.

Senator **Metzenbaum**. Did you ever personally confront voters at Bethune precinct?

Justice **Rehnquist**. Confront them in the sense of harassing or intimidating?

Senator **Metzenbaum**. No. I mean in the sense of questioning them, asking them about their right to vote, asking them about the Constitution, asking them to read something, asking them questions having to do with their voter eligibility?

Justice **Rehnquist**. And does this cover Bethune precinct for all years?

Senator **Metzenbaum**. Yes. Did you ever personally confront a voter?

Justice **Rehnquist**. I do not believe I did.

Senator **Metzenbaum**. Would you categorically say you did not?

Justice **Rehnquist**. If it covers 1953 to 1969, I do not think I could really categorically say about anything.

Senator **Metzenbaum**. Do you think at some time you did personally confront voters at Bethune precinct?

Justice **Rehnquist**. No. No, I do not.

Senator **Metzenbaum**. Well, then what do you mean when you qualify your answer?

Justice **Rehnquist**. Well, to the best of my recollection. You are talking about something in 1953; it would have been 33 years ago.

Senator **Metzenbaum**. Mr. Justice, I am not talking about your being able to remember where you were on the third day of June 1952. I am talking about whether you ever confronted people and said to them: "Can you read this Constitution?" "What educational background do you have?" Challenge them in their right to vote. And you are saying that you do not remember. And I am saying to you, is it possible that a man as brilliant as you, could not remember if he had done that?

Justice **Rehnquist**. Senator, challenging was a perfectly legitimate thing.

Senator **Metzenbaum**. But you told the Senate that you never challenged anybody.

Justice **Rehnquist**. I believe I told the Senate, Senator, in 1971, over a given period of years, I did not think I had challenged some, and I stand by that testimony. I think you are broadening it to go way back into the early 1950's.

Senator **Metzenbaum**. You said in none of the years between 1958 to 1968 did I personally engage in challenging the qualifications of any voters. Did you do it before that? Did you challenge voters before that?

Justice **Rehnquist**. I do not believe I did, no. Again, I point out that that is 30 years ago.

Senator **Metzenbaum**. A person who is identified only as a Phoenix lawyer, is quoted in the Washington Post as stating that he visited a minority precinct in 1962, and that:

> We walked up a flight of steps to a schoolhouse. Bill had a camera and he took a picture of us as we came up.

The Post story also says:

> The lawyer said that Rehnquist acknowledged he had been taking similar pictures all day. The attorney said that they asked whether this amounted to harassment of voters. Rehnquist reportedly laughed and said there was no film in the camera.

Did you ever have a camera at a voting place?

Justice **Rehnquist**. I do not think so, no. I cannot imagine why I would have had one. I have no recollection.

Senator **Metzenbaum**. That attorney is misstating, 100 percent misstating the facts?

Justice **Rehnquist**. I think he is.

Senator **Metzenbaum**. Mr. Melvin Murkin, an attorney in Phoenix, told the FBI that he recalled seeing you give instructions to challengers in a polling place, and that voters in line began to leave as a result.

He said he confronted you and told you that people did not want to be embarrassed like that. Is he being untruthful as well?

Justice **Rehnquist**. As to the first part, Senator, if he saw—he certainly could have seen me giving instructions to challengers in a polling place. As to the second part, would you read that again.

Senator **Metzenbaum**. He said he confronted you, and told you that people did not want to be embarrassed like that. And he also said that voters in line began to leave as a result of your having given instructions to challengers.

Justice **Rehnquist**. I have no recollection of that, no.

Senator **Metzenbaum**. And what instructions did you give to the challengers?

Justice **Rehnquist**. We gave instructions to challengers generally the night before the election, or maybe two nights before the election. Read the statute to them, told them what could lawfully be done, what could not lawfully be done.

Senator **Metzenbaum**. But Mr. Murkin is saying that he recalled seeing you give instructions to challengers in a polling place.

Justice **Rehnquist**. Well, I think I said in my 1971 statement to the committee, Senator, that on one occasion, in some polling place—and I do not think I specified it then, and I certainly do not remember it now—I came upon one of our challengers exercising challenges in what I thought was an unlawful manner, and told him to stop.

Senator **Metzenbaum**. You told the committee in 1971 that you recruited lawyers to work on a lawyers committee on election day in 1960. What were your activities in connection with that committee and what was the committee?

Justice **Rehnquist**. I have only the most general recollection now, and I think I stated, in more detail, in 1971. I think it was a committee to assist in the poll watching and challenging process in the 1960 election.

Senator **Metzenbaum**. Mr. Ralph Staggs, who was Republican county chairman, has stated that he established a committee of 12 lawyers, with you as the chairman, to oversee the challenging of voters during the 1962 election. Did the challengers take their instructions from you?

Justice **Rehnquist**. I would think that we probably had some sort of a challengers' school at which one of the lawyers spoke. At this passage of time I could not say whether it was me, or somebody else.

Senator **Metzenbaum**. Do you know Charles Hardy?

Justice **Rehnquist**. Yes.

Senator **Metzenbaum**. He is a Federal judge now?

Justice **Rehnquist**. Yes.

Senator **Metzenbaum**. And he described the Republican challenger program in Phoenix, in 1962, in a letter to Senator Eastland. He stated:

> In 1962, for the first time, the Republicans had challengers in all of the precincts in this county which had overwhelming Democratic registrations. At that time, among the statutory grounds for challenging a person offering to vote, were that he had not resided within the precinct for thirty days preceding the election, and that he was unable to read the Constitution of the United States in the English language. In each precinct every—and that every is his emphasis, he underlines it—every black or Mexican voter was being challenged on this latter ground, and it was quite clear that this type of challenging was a deliberate effort to slow down the voting so as to cause people awaiting their turn to vote to grow tired of waiting, and leave without voting. In addition, there was a well organized campaign of outright harassment and intimidation to discourage persons from attempting to vote. In the black and brown areas, handbills were distributed warning persons that if they were not properly qualified to vote, they would be prosecuted. There were squads of people taking photographs of voters standing in line to vote and asking for their names. There is no doubt, that these tactics of harassment, intimidation, and indiscriminate challenging were highly improper, and violative of the spirit of free elections.

Yet despite your leadership role in that area, you stated in 1971: "The practices described by Judge Hardy to the extent that they did in fact obtain did not come to my attention until quite late on the day of the election in 1962."

Now you have already told us that you were head of some of these committees, that you may or may not have been giving the instructions to the challengers.

How do you reconcile Judge Hardy's comments concerning what the challengers were doing, and what you, Justice Rehnquist, were doing at that time, since they seem to be inconsistent with each other?

Justice **Rehnquist**. I did not detect inconsistencies.

Senator **Metzenbaum**. Well, you indicated that you were only advising them what the law was, that you had only explained the law to them, and that you had tried to help resolve issues.

Judge Hardy indicates that there was a deliberate effort of harassment, intimidation and indiscriminate challenging.

Justice **Rehnquist**. Those challenges that Judge Hardy described were not following the instructions that they got from the lawyers group.

Senator **Metzenbaum**. Did you know about it at the time?

Justice **Rehnquist**. I think I said in the affidavit that you just quoted that I learned about it late in the day.

Senator **Metzenbaum**. What action, if any, did you take?

Justice **Rehnquist**. I do not remember it.

Senator **Metzenbaum**. Let me ask you some other questions.

When you were a Supreme Court Clerk—how much time do I have left?

Mr. **Short**. Approximately 4 minutes.

Senator **Metzenbaum**. When you were a Supreme Court Clerk, you prepared a memorandum regarding the *Brown* v. *The Board of Education* case. The memorandum recommended to Supreme Court Justice Jackson that he vote to uphold segregated schools by upholding the old separate but equal doctrine.

Now you told the Senate in 1971 that this memo was not a cause for concern because it represented Justice Jackson's views, not yours.

I must say that, in reviewing the record, I have a hard time accepting that statement. I should also say that although I am concerned about the views you held as a Clerk 30-years ago when you were a Clerk, I am more concerned about what you told the Senate during your confirmation hearings to be on the Supreme Court. At that time, you wrote, "It was intended as a rough draft of a statement of his"—that meaning Jackson's views at the Conference of the Justices—"rather than as a statement of my views."

Now, the first point that troubles me in this memo is that this memo is simply not written as if it is supposed to be someone else's views. It does not say Justice Jackson, in such and such a case, you said this, and in another case, you said that. Instead, it uses the pronoun "I" several times. And it concludes by saying, "I realize it is an unpopular and nonhumanitarian position. I think *Plessey* v. *Ferguson* was right and should be reaffirmed."

Again, Mr. Justice, we now not only have the question of your point of view, we have the question of the accuracy of your representations to the committee at that time that is of concern to this Senator and, I would guess, to a number of other members as well.

Does not the memorandum that was written, that you wrote, does it not have language that would indicate that you were indicating your views, not Justice Jackson's views?

Justice **Rehnquist**. Yes, I suppose one could read it either way. The "I's" in it certainly could have been mine rather, just looking at it as a text, rather than Justice Jackson's.

Senator **Metzenbaum**. Well, there were other memos. As a matter of fact, Justice Jackson had different views on the case and then joined the decision to strike down the separate but equal doctrine, did he not?

Justice **Rehnquist**. He did in the second argument. Chief Justice Warren, however, says that in the conference after the argument in December 1952, that the views Justice Jackson expressed were contrary to what he ultimately came up with.

Senator **Metzenbaum**. This is your memo. I believe that the memorandum was prepared by me as a statement of Justice Jackson's tentative views for his own use at conference. The informal nature of the memorandum and its lack of introductory language made me think, and then it goes on.

What concerns me is that thereafter you represented that it was not your position. You had a perfect right to have that position. Nobody would argue about that. What would concern me and others is that if that was your position, why did you indicate to the committee that it was the position of Justice Jackson?

We have other memos of yours where you marked as a section, "Your ideas," referring to Jackson.

And how do you explain the fact that here is one that talks about I, I, I; others say your ideas, and then you come back and say to the committee I think those were Justice Jackson's views? How do you explain that to us?

Justice **Rehnquist**. Justice Jackson was a great believer in the idea of whatever you want to call representative democracy, the Court having made mistakes in the past by reading its own moral views into the Constitution. And much of the theme of the one and a half page memo is along those ideas that the Court has run afoul in the past by reading into the Constitution what it felt were the morally right views, only to find that it had made a mistake. And this apparently was an effort to apply those ideas to the *Brown* case.

Senator **Metzenbaum**. But you said to the committee in 1971, "I am satisfied the memorandum was not designed to be a statement of my views on these cases."

Senator **Hatch** [presiding]. Senator Metzenbaum, your time is up.

Senator **Metzenbaum**. I have not had a minute.

Mr. **Short**. No. It blinked a few seconds.

Your time is up.

Senator **Hatch**. I did not realize I was presiding.

Senator **Metzenbaum**. I have difficulty in understanding why you said it was "my views," and then you make this distinction with Justice Jackson's views, and then say to the committee that those were Justice Jackson's views and not yours.

Nothing in the memo would seem to confirm that at all.

Justice **Rehnquist**. Is that a question, Senator?

Senator **Metzenbaum**. Yes.

Justice **Rehnquist**. I have tried to explain that the theme of the memo, the failures of the Court in the past was a very strongly held value of Justice Jackson.

Senator **Metzenbaum**. I will reserve the balance of my questions until later.

Senator **Hatch**. Thank you.

Mr. Justice Rehnquist, let me just clarify the record to a degree, because Judge Charles L. Hardy, whom Senator Metzenbaum has just mentioned, of course, is a lawyer in charge of the Democratic Party Committee which served as an arbitrator of voter challengers and disputes in the 1962 election.

In his letter to the Judiciary Committee back in 1971, Judge Hardy unequivocally states that you, Mr. Justice Rehnquist, were not involved in the Bethune precinct incident. And specifically he stated this, and this is a Democrat, the leader of the Democrats in that State at the time on this issue:

> I can state unequivocally that Mr. Rehnquist did not act as a challenger at the Bethune precinct. Because of the disruptive tactics of the Republican challenger at that precinct, I had occasion to be there on several occasions. About 4 p.m., after a scuffle, this Republican challenger was arrested and removed from the polling place by sheriff's deputies. Thereafter, there was no Republican challenger of Bethune. Challenging voters was not a part of Mr. Rehnquist's role in 1962, or subsequent election years, nor did he have anything to do with the recruitment of challengers or their assignments to the various polling places.

I think pretty good language to show backing by those who were partisan basically differing from you, though what you have been saying here is correct. Matter of fact, in his interview with the Federal Bureau of Investigation, Judge Hardy made it very—I will just cite the conclusion that he made. He said, Judge Hardy stated that he and Justice Rehnquist are politically opposite, but that there is no question in his mind as to Rehnquist's legal ability and qualifications for the position for which he has been nominated. So that the record needs to show that.

Second, there was a comment that Senator Goldwater had voted for the 1964 Civil Rights Act. He had not. He voted against it. Just so the record is clear on that.

Now, on this last point, Mr. Cronson, one of the points Senator Metzenbaum was making, is it not true, to your knowledge, that Mr. Cronson said in a 1971 New York Times article, that "Both of us personally believe that Plessey was wrong." And that he further said in a 1971 telegram that, "It is probable that the memorandum is more mine than yours?"

Are you familiar with both of those quotes?

Justice REHNQUIST. I am familiar with both of those quotes, yes.

Senator HATCH. Are they not true quotes to the best of your knowledge?

Justice REHNQUIST. They are certainly true quotes in the sense that I am sure that Don Cronson said them.

Senator HATCH. Well, that is what I am concerned about.

Now, it seems to be most important that both people present at the time the memo was drafted agreed that you were not expressing your own views in that document. Cronson's explanation was that you were assigned to write one side of the issue and that the memo was a joint product which may have been more his thoughts than yours.

Now, your remembrance is that Mr. Justice Jackson wanted the memo to reflect his own views in conference, but both agree that the views were not your own in that memorandum. Is that correct?

Justice REHNQUIST. I think it is, Senator.

Senator HATCH. All right. Now, with regard to being the lone dissenter, there has been some criticism that you have been in dissent quite a few times on the Court. I personally find no problem with that. I think the dissenters in the courts—on the Supreme Court sometimes turned out to be the greatest Justices of all. Mr. Justice Holmes is probably one of the all time great dissenters is a good illustration.

But you are not the greatest sole dissenter on the present Court. Mr. Justice Stevens has dissented many more times during the period in which your terms have overlapped. For instance, Stevens had 51 merit dissents and you had 40 and full opinions over the last 10 years. I might add that Justices Brennan and Marshall remain the greatest dissenters on the present Court together, dissenting alone together hundreds of times over the last few years in particular.

In the last 2 years, they dissented all by themselves many more times than you, who have dissented only seven times during that same period of the last 2 years. In fact, you wrote only 75 dissents in the 5-year period, from 1980 to 1984, as compared to 106 for Justices Brennan and Marshall, or should I just say just for Brennan, and 145 for Justice Stevens during that same period. I just think the record has to show these things because I think it has been misconstrued by some of my colleagues.

Now, total dissenting votes which would measure who was on the losing side show that over the last 5 times, that is from 1980 to 1984, you dissented in 152 cases, as compared to 245 cases for Mr. Justice Brennan. And I find no fault with Mr. Justice Brennan for doing that. I think when you disagree and think the law is incorrect, as enunciated by the majority, you ought to dissent. And you have had the courage to do that. You could go on and on.

Let me just ask you a couple of questions about the *Brown* decision. Because you have had some questions on that in the last while.

Your 1952 state of mind, when you were working as a law clerk to Mr. Justice Jackson, was not unusual. We have to remember that the Court itself struggled with this case as it had struggled with no other in recent memory. And I think we have to remember, No. 1, that the Court ordered a reargument on that case. No. 2, the Court ordered a separate hearing on remedy. And, of course, the records of the Court show that.

It seems to me that the Court was very confused on that case and it was cautious, and it is understandable to me that a clerk would be similarly cautious. For instance, you said on March 3, 1985, in a New York Time magazine article, entitled "The Partisan," that your views on *Brown* have probably changed since 1952. You stated repeatedly that your co-clerk thought and agreed that you thought plus he was wrong in 1952. In other words, you never doubted that State-sponsored discrimination or segregation ought to be held unconstitutional. That is true, is it not?

Justice REHNQUIST. Yes.

Senator HATCH. You have always held that position?

Justice REHNQUIST. Yes.

Senator HATCH. There is nonetheless a perfectly reasonable argument the other way, as cited by your Partisan article, the article was called a Partisan article.

We sometimes forget that in 1952, the Court had struggled greatly with the *Brown* case. For instance, I have the notes here, Justice Jackson's notes from that conference in his own handwriting. And those notes show that from the first 1952 conference on Brown, they indicate that then Chief Justice Vinson stated that he was not sure what to do to resolve that case. It was not Chief Justice

Vinson, according to the notes. He noted that there were 60 years of precedent behind the *Plessey* decision, and the Congress had itself passed no statute to the contrary, which was a matter of great concern to him, at least from these notes of Mr. Justice Jackson. In fact, as he pointed out, Congress had affirmatively acted to segregate the District of Columbia schools even after the Harlan dissent in Plessey, which did not refer to schools at all, as you know.

In other words, even the Chief Justice, the then Chief Justice made an argument before his colleagues that it was "perfectly reasonable to argue the other way."

So I just want to point that out, that it was not unusual for any sincere person to be concerned about the massive change in law that that was going to bring about, that your position has never been inconsistent, even then against the *Plessey* decision.

Is that correct?

Justice REHNQUIST. Yes.

Senator HATCH. All right. Now, your 1952 state of mind is important also because, as I reviewed the cases, I found that you have supported and cited the *Brown* v. *The Board of Education* decision as you have supported the *Brown* decision in 34 cases since you have been a Justice on the U.S. Supreme Court.

Are you aware of that?

Justice REHNQUIST. I am, Senator. And I made an excerpt here of a case in which I joined the Chief Justice's opinion in a case called *Milliken* against *Bradley*.

Senator HATCH. Right.

Justice REHNQUIST. Where the Court said—this was not just kind of citing Brown as authority—here is what the Chief Justice's opinion said in that case.

Ever since *Brown* v. *The Board of Education*, judicial consideration of school desegregation cases has begun with the standard, and this is a quote from Brown, "In the field of public education, the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal." And the Chief's opinion goes on to say this has been reaffirmed time and again as the meaning of the Constitution and the controlling rule of law.

Senator HATCH. Now, there is no question that you have stood very firmly behind the *Brown* decision, and I find it a little reprehensible that people come in here and try to say that you have been against civil rights when you actually supported at least 34 cases, citing Brown as the reason for that support.

I might say, in the first place, I think it is important to establish that there is nothing extreme about your views on civil rights. And I think that term has never been abused as much as it was yesterday and probably will be throughout the remainder of these hearings. Nonetheless, I think it might require a little bit of time here to show that you are in the mainstream.

To start with, let us look at the constitutional issues. In the *Wygant* case, you joined the plurality opinion written by Mr. Justice Powell, is that correct?

Justice REHNQUIST. Yes. Yes, I did.

Senator HATCH. All right. In other words, you joined in opinion with four of your other colleagues which stood for the proposition that a school board could not give racial preferences to some teachers when deciding who to lay off.

Justice **Rehnquist**. Senator, I am not sure there were four other colleagues on the opinion. I think there might have been just a total of four people, maybe even a total of three people on Justice Powell's.

Senator **Hatch**. All right. But I understand that case, in that case the school board was using race in its lay-off decisions to retain proportional representation on the faculty. And as I recall that decision, the plurality decision in which you joined, agreed that strict scrutiny applies to racial classifications, but concluded that there was not sufficient evidence to justify the conclusion that there had been prior discrimination. That is what the plurality decided, is that correct?

Justice **Rehnquist**. To the best of my recollection, yes.

Senator **Hatch**. All right. In the absence of a showing of discrimination, "societal discrimination without two or more imposing a racially classified remedy."

Now, do you recall if there were any dissents in that case?

Justice **Rehnquist**. Yes. I have a feeling that as to whether the judgment of the court of appeals should have been affirmed or reversed, there were five to—I am not sure. But the more I think about it, it seems to me it came out 5 to 4, but I could be wrong on that.

Senator **Hatch**. Well, it seems to me that there were dissents, of course, and that the Senators who find your views extreme on this particular issue or this type of a case are only upset because their preferred view was not the one which prevailed in the Court. They wanted the dissents to prevail, but they did not.

Now, their dissents, as I recall, wanted quotas to be used in layoffs, in these layoffs, even if there was no showing of past discrimination. Is that correct?

Justice **Rehnquist**. That is certainly the best of my recollection, Senator. But I want to state that it was a fairly complex fact situation——

Senator **Hatch**. It was.

Justice **Rehnquist**. Of course, the opinion itself would be the authoritative statement of what the facts were.

Senator **Hatch**. All right. But if that were true, then it seems to me that winning quotas to be used as an extreme position in civil rights law.

Let me just go to another case, and that is the *Fuller-Love* case. You were joined in dissent on that case by Mr. Justice Stewart, who I think has been a very fine Supreme Court Justice before he died.

Justice **Rehnquist**. I certainly agree with you 100 percent on that, Senator.

Senator **Hatch**. He was a wonderful man. I knew him well.

In other words, you were not alone or even the lead opponent or adherent of this point of view, although it was, I think, a commendable point of view.

Justice Stewart based his dissent to the Court's decision to uphold a racial setaside on Harlan's dissent in Plessey, which begins, "Our Constitution is color blind."

Now, it was Stewart's opinion which you joined that "except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the Government from taking detrimental action against innocent people on the basis of the sins of others of their own race."

Now, that sounds pretty mainstream to me. You seem to be saying, and certainly Mr. Justice Stewart seems to be saying, that when racial discrimination is proven, it should be remedied swiftly. You believe that?

Justice REHNQUIST. Yes, I do.

Senator HATCH. Otherwise, the Government ought not to presume to use quotas or other race-conscious remedies unless discrimination is first established.

Justice REHNQUIST. I draw back a little bit at paraphrasing there, Senator, because we had the *Wygant* case and we had a couple other cases up there, and your summary may be entirely accurate. But I'm loath to subscribe to it unqualifiedly without a better recollection.

Senator HATCH. Well, I'm not trying to put you on the spot, but I am trying to say there was a good reason, or there were good reasons, for your dissent in that particular case, because here were racial set-asides that were preferentially made, without a showing of real discrimination, or discrimination at all, other than statistics, and they don't, in and of themselves, prove discrimination.

There is a considerable body of law, and there are considerable legal advocates, who would sustain throughout this society your particular position. In fact, there are some who say we shouldn't have discrimination in any form, whether it's in forward gear or reverse gear. I just wanted to make that point.

In the *Bakke* case, which concerned the impact of title VI, in a special admissions program, you joined the opinion of Justice Stevens.

Justice REHNQUIST. Yes, I did.

Senator HATCH. Now, Mr. Chief Justice Burger and Justice Stewart were also joiners on that opinion as I recall.

Now, the argument of you four Justices was that exclusion of any individual on the basis of race would violate the plain language of title VI of the Civil Rights Act of 1964.

Once again, it seemed to me you were right in the mainstream of the Court. Incidentally, Bakke was admitted to the school. In title VII cases, we could start with the *Weber* case. That was a case upholdinq the collective-bargaining agreement which contained a hiring quota, as you know. You dissented, in an opinion again joined by the Chief Justice; is that right?

Justice REHNQUIST. Yes, I did.

Senator HATCH. Once again, I would note that no one here I think can assert that Chief Justice Burger is out of the mainstream. Your dissent, as I recall, once again maintained that a quota is, per se, violative of the notion of equality and that title VII does not permit that interpretation.

Again, it seems to me that this is not something that could be called extreme because, again, your logic prevailed in the famous *Stotts* case, when the Court held that court-ordered preferences based upon the color of a person's skin, solely on that basis, violates section 706(g) of title VII. That case decided that court-ordered relief was to provide "make whole" relief only to those who have been actual victims of discrimination.

Do you see the *Stotts* case as beneficial to a policy of nondiscrimination for all Americans?

Justice REHNQUIST. Senator, that's an issue that was before us in the *Stotts* case; it was again before us in *Wygant* and a couple of other cases. It is going to come before the Court again, I'm sure. It's a very critical issue right now.

Senator HATCH. So you would rather not comment on it?

Justice REHNQUIST. If you would forgive me, I think I would prefer not to comment on it.

Senator HATCH. Well, all I'm saying is, anybody who thinks about it can see that there are two legitimate sides to these arguments. You're not extreme because you might take one side or the other. There are good arquments to be made here.

I think you could go on to note that in the *Stotts* case, that *Stotts* was not applied to court decrees entered with the consent of the employer. For instance, in the *Firefighters* v. *Cleveland* case, just decided this year, you were amongst the dissenters in that limitation and in the *EEOC* case decided the same day. The *Equal Employment Opportunity* case said that court-ordered relief need not be limited to actual victims but must be narrowly tailored to correct past discrimination.

So, in summary, all I'm trying to bring out here with this line of remarks and questions is that you interpret the Constitution, as I see it, to protect all individuals from racial discrimination.

Justice REHNQUIST. I'm glad you see it that way, Senator, and I agree with you.

Senator HATCH. In other words, the engines of discrimination are just as insidious, whether—as I have said before, whether they run in forward gear or reverse gear. Reverse discrimination is maybe just as insidious or invidious, to use the Supreme Court term, as forward discrimination.

Now, it seems to me this utter distaste of yours for discrimination is a mainstream position. You may differ on these points, like many great constitutionalists do. But you, like most Americans, believe that the Constitution is color blind and I, for one, want to compliment you for recognizing that and I personally resent you being called an extremist because you don't always agree with one point or the other with regard to civil rights law, which is complex, difficult, and, of course, very controversial in every debate we have on the Judiciary Committee and in every debate you have there.

Justice REHNQUIST. Thank you, Senator.

Senator HATCH. I think, Mr. Chairman, that's all I will take for now.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman.

Justice Rehnquist, we have had a lot of affidavits read to you from people who have said you were involved in challenging and abusing voters and what have you in 1962 and 1964. As the Senator from Utah pointed out, Judge Charles Hardy stated in his recent statement to the FBI that he knew there were incidents which occurred in the Bethune precinct in 1962 or 1964. He has been active in the Democratic Party for a long time. He said it is no doubt that Republicans were engaged in a deliberate attempt to discourage minority voters for a period of several election years—that being the Judge's statement.

Were you involved in any way to discourage minority voters in 1962 or 1964?

Justice REHNQUIST. Only in this very possible way, which I would not think would be a correct answer to your question. But if you say you were discouraging minority voters by putting a challenger in at precincts which were heavily Democratic and which certainly had a number of minority voters voting at them, in order to lawfully take advantage of the State law which permitted observing the election board functioning and challenging as provided by law, one could say, I suppose, that that did discourage minority voters. But not lawful minority voters.

So if you would just amend your question to say lawful voting by minorities, I could answer unqualifiedly "yes".

Senator DECONCINI. You were not involved, then, in discouraging, from your standpoint, in discouraging lawful minority voters?

Justice REHNQUIST. No.

Senator DECONCINI. Now, Judge Hardy goes on to say that he does not recall seeing Rehnquist at the precinct; he has heard others say Rehnquist was there, but he did not see him. We have seen the letter that was written.

Now, I want to read to you something of one other prominent Democrat at the time—his name is Judge Thomas Murphy. Judge Murphy was interviewed this month. He was presiding president of the Young Democrats in Phoenix, AZ during the 1960's. He says he did not recall the incident during either of elections, and he described the 1962 election as not that exciting. He did become chairman of the Democratic County in 1964, so the record has it, and as that County Chairman, Murphy describes the Republican observers as "nice ladies", and thought the allegations being made about William Rehnquist were "a bunch of crap." Murphy described William Rehnquist as a man of the highest integrity, a gentleman, a fine lawyer, et cetera.

The reason I get into this, Justice Rehnquist, is because I would much prefer to have Mr. Hardy here, Mr. Pine here, Mr. Harper, Mr. Brooks, Mr. Smith and the others who have been quoted here, indicating that you acted improperly. As long as we're qoing to get into that game here, I think it's important that those who felt you acted properly during that time should also be on the record.

Your involvement as a challenger, can you tell us for the record, in those days I was a challenger also for the Democratic Party in Pima County those very years. Can you tell us what that amounted to as far as your interpretation of what a challenger was?

Justice REHNQUIST. In the years that we are talking about in the 1971 affidavit which I think is 1958 through perhaps 1968 or something like that, and I think I stated that I was not myself, I did not myself challenge during that time.

Senator DECONCINI. You never were a challenger?

Justice REHNQUIST. I cannot say going back way further into the 1950's that I was not, and one of the reasons it is hard to say is because to even watch an election counting in a precinct where you did not have someone on the election board, the only way to get in, perhaps you recall or maybe the law was changed by the time you younger people came along, was to send someone in as a challenger.

Then they would frequently let the person stay to watch the counting of the ballots, but in the years that we are talking about in the 1971 affidavit and conflicting testimony and so forth, I stated as fully as I could on the basis of my recollection in 1971 what I had done in each of those years, summarizing on the basis of a much fainter recollection now.

I think my activity was primarily that of a member and perhaps 1 year a chairman of a lawyers committee that tried to tell the challengers in advance what they could do and then one biennial election—I cannot remember which it was—I know that Charlie Hardy and I made rounds on occasion to try to settle——

Senator DeConcini. You are in the position, Judge, as a lawyer or the head of the committee advising challengers, what were the specifics as you can recall that a challenger could do? What could a challenger do that was legal?

Justice Rehnquist. I cannot recall from memory now what a challenger could do. But I notice Senator Metzenbaum and Senator Kennedy said that a challenger could challenge on the basis of reading the Constitution in English and failing to reside at the place where you claim to reside for 30 days before the election.

I do not vouch for that. That rings a bell with me. I think perhaps that is the way it was.

Senator DeConcini. Do you recall giving that type of advice to Republican challengers?

Justice Rehnquist. I certainly gave that type of advice, reading from the statute probably. I cannot remember exactly what was in the statute.

Senator DeConcini. What exactly was the committee that you headed up 1 year or part of? Was this a lawyers committee to give advice on call or something?

Justice Rehnquist. Well, it sounds perhaps a little more glorified than it was. It was lawyers who would volunteer a couple hours on election day to come over to county headquarters perhaps or sometimes work out of their offices in case legal disputes arose, you know, some question was raised by someone on the county committee somewhere else as to some election practice, and we wanted a lawyer handy to give a legal answer.

Senator DeConcini. You are familiar with Ralph E. Staggs?

Justice Rehnquist. Yes, I am.

Senator DeConcini. He was, I think, county chairman in 1962 for the Republican Party. He indicates that he was responsible in January 1961 and he organized the challenging committee in preparation of the 1962 general elections in November.

He goes on to say that he was advised that the Democratic Party was very strong during the early 1960's. The Republicans were concerned about challenging any and all fraudulent voters in the 1962 elections.

Staggs advised he organized a committee of 12 lawyers to oversee the challenging of unqualified voters and he appointed William Rehnquist chairman of that committee. Is that accurate?

Justice REHNQUIST. I would have no reason to doubt it certainly. I cannot presently think back and say yes. But I have no reason to doubt that.

Senator DECONCINI. He goes on and says that he himself sent two precinct committeemen to voters precincts in the Bethune School in Phoenix. One of the committeemen was named Wayne Benson. Do you remember that name?

Justice REHNQUIST. I remember that name, yes.

Senator DECONCINI. Do you recall that Mr. Benson, as Mr. Staggs says here became embroiled in a confrontation in which he displayed a card with an excerpt from the Constitution and asked various voters to prove their literacy by reading the excerpt aloud?

Justice REHNQUIST. I think I might have heard about it on the phone the day it happened, and I think that I read about it in the paper the next day.

Senator DECONCINI. And some of the voters happened to be black—this is according to Staggs—and other minorities and several became discouraged from voting. Staggs suggested that one of the reasons these voters did not vote was because they were aware that their illegal status had been discovered by Benson and other poll watchers.

He, Staggs, advised that he dispatched Rehnquist from the Republican county headquarters, located at 32d and Oak Street, to go to the Bethune School, clear up the disturbance involving Benson.

Do you recall that that he dispatched you?

Justice REHNQUIST. No, I do not.

Senator DECONCINI. You do not recall him asking you to go?

Justice REHNQUIST. No, I do not.

Senator DECONCINI. He goes on and says that Staggs advised he also sent Harold Musgrave to replace Benson as a poll watcher for the Republican Party. Do you remember Harold Musgrave?

Justice REHNQUIST. Harold, I could not give you a face, but certainly the name Harold Musgrave sounds familiar.

Senator DECONCINI. Stagg emphasized that Rehnquist was not involved in any direct challenge to any voter at the poll. He added that Rehnquist's roll was merely to serve as a peacemaker and resolve a dispute between Benson and officials of the Democratic Party.

Staggs said that Rehnquist returned about an hour and a half later to Republican county headquarters. Staggs could not recall any explanation by Rehnquist concerning the Benson confrontation.

So you do not remember this incident at all even being asked by Staggs or——

Justice REHNQUIST. No, I really do not.

Senator DECONCINI. Do you recall the committee of 12 lawyers?

Justice REHNQUIST. I recall a committee of lawyers. I could not tell you if there were 12 of them.

Senator DECONCINI. As part of that committee of lawyers and being the chairman of it, is that something that you probably would have been doing at the request of the chairman if there was a confrontation at a precinct?

Justice REHNQUIST. It certainly could have been, yes.

Senator DeConcini. I mean, was that not what the committee was supposed to do which is go and resolve matters or disputes?

Justice Rehnquist. If trouble came up, it was our job to go out and see if we could solve it.

Senator DeConcini. When you and Judge Hardy, the quote I think you said "made some rounds", is that what you were doing then?

Justice Rehnquist. Exactly. Troubleshooting.

Senator DeConcini. You say "troubleshooting". You were seeing whether or not challengers on either side of the political aisle were involved in any disputes that needed to be observed by the party officials?

Justice Rehnquist. Yes. Our problem, as I recall, was usually getting our challenger into the election place and the Democrat on occasion has complaints about the qualification that our challenger would have.

Senator DeConcini. Do you recall what a challenger had to do? Did you have to submit this challenger's name to get him in there before the election?

Justice Rehnquist. Again, I do not have a very clear recollection.

Senator DeConcini. I remember, I would hate to be asked what I did on challenging in 1962 and 1964 in Pima County, because I was a challenger and a legal observer for the Democratic Party, but I can't remember which precincts I went to. But I was on call, as apparently you were, Judge Rehnquist.

According to Staggs, there were "the good old days", we Democrats' days, back in 1962. The Democratic Party was very strong during the early 1960's. Things have changed a bit in our State.

Let me turn to something else because I have a feeling, Judge Rehnquist, we're going to revisit this question of this particular subject matter probably time and time again. There have been witnesses asked to come, and I hope they do come, including Judge Hardy, perhaps, to testify in this matter, and those that have reported to the FBI and signed affidavits regarding your alleged improprieties back in 1962 and 1964, so we're going to have this subject matter before us for another day or two.

I would like to turn to another subject matter which has been touched on, Justice Rehnquist, and that is, as the Chief Justice, you are the Chief Justice of the United States. You head up the—you are the Chairman of the Judicial Conference and other administrative powers.

One of the interests that I have had a long time is the judicial branch of enforcing judicial discipline, and there has been some legislation passed back in the late 1979's which I authored, but I was very disappointed what we finally put through, mainly I might say because of the objections of judges around the country.

I wonder if you have a knowledge of the Judicial Tenure Act that was passed, whether or not you think that the circuit judges should complete the work of that act and/or whether or not you think they have, what could be done to see that the circuit judges, in accordance with that act, set up their procedures for reviewing complaints about judges?

Justice Rehnquist. Senator, I realize that is very much the prerogative of the Chief Justice to keep abreast of matters like that.

But I must confess that I am much less abreast of it than I would like to be.

I know that the act was passed and that it gives the judicial council, the collective judges of the various court of appeals some disciplinary powers over other judges. And I have a couple instances in mind where I have a feeling that those powers have probably been exercised.

But I simply have not made enough of a study of it, and I am not familiar enough with just what each circuit council has done to be able to give an informed answer to your question.

Senator DECONCINI. Let me just quickly review title 28 of the Judicial Discipline Act. Section 372 says, and I quote, "Any person alleging that a circuit or other judge is engaged in conduct prejudicial to the business of the court may file with the clerk of the court of appeals a complaint." It goes on to say, "Complaints are to be reviewed by the chief judge of that circuit."

Section 372 says, goes on to detail the process, including the formation of a special committee to investigate the facts and allegations in the complaint.

As the Chief Justice of the United States, do you care to comment of your views of this act and what you intend to do if in fact it has not been implemented in all of the circuits?

Justice REHNQUIST. Well, I would certainly think that was something that would merit the serious attention of the Judicial Conference of the United States which has the sort of administrative capacity to see whether the various circuit councils were doing what they were required to do under the law.

Senator DECONCINI. Can I take from that that you indicate an interest in that yourself, and you intend to be involved in the implementation of that act?

Justice REHNQUIST. Certainly. Certainly.

Senator DECONCINI. I just want to, as one member of this committee, encourage that. Justice Burger has done some great things on the Judicial Conference, including setting out some guidelines for this. I know he has been very busy, and I hope the new Chief Justice, which I think is going to be you, would take a careful look at this and see that these circuit courts have implemented this act. And I think the personal attention of the Chief Justice would have a lot to do with that coming about.

Mr. Justice, we are constantly besieged here and told about the crisis in courts. Justice Burger justified the need for the intercircuit panel by emphasizing the crisis nature of the Court's caseload.

Do you believe that we are in a crisis level and that the caseload is too heavy for the Supreme Court?

Justice REHNQUIST. Senator, I do not believe that the current caseload is too heavy for the Supreme Court, as I indicated to Senator Mathias. But I respect the Chief Justice's contrary view. He is following Justice Frankfurter's idea, I think, that ideally when you are dealing with very important cases that take a lot of thought and have a lot of arguments, pro and con, maybe a nine-judge court would do better to take 100 cases a year rather than 150.

My own feeling is that all the courts are so much busier today than they have been in the past, that there would be something almost unseemly about the Supreme Court saying, you know, everybody else is deciding twice as many cases as they ever have before, but we are going to go back to two-thirds as many as we did before.

I think that we can manage to decide 150 and do a reasonably competent job.

Senator DECONCINI. Do you believe that we should consider or pass the intercircuit panel?

Justice REHNQUIST. I believe very strongly that you should pass that.

Senator DECONCINI. How do you believe those judges ought to be appointed? Do you think they should be appointed from the circuit, from the Supreme Court, or the President? Do you have an opinion?

Justice REHNQUIST. I have an opinion which I think may disappoint you to a certain extent, Senator.

The Chief Justice proposed in his bill or draft, suggested that they be appointed either by the Chief Justice or the Supreme Court. And I do not regard this as terribly desirable because the Supreme Court as a body, I do not just think it is very good at administrative tasks like that.

I believe your bill calls for appointment by the circuit councils?

Senator DECONCINI. Correct.

Justice REHNQUIST. And I share some of the Chief's misgivings about that. They were not expressed the same way I think he expressed them, that it could make the new court a kind of a United Nations where each of the circuit judges is primarily loyal to his circuit or her circuit and the doctrine of that circuit rather than being an independent member of the new court.

I think in time and, goodness knows, it is obviously going to take time to ever get the intercircuit tribunal passed, we are going to have to recognize it as a new court with judges appointed by the President and confirmed by the Senate, and not as a borrowing proposition.

Senator DECONCINI. Is it your belief, Judge, that that court should be a totally separate court of other judges or should it be—I mean new appointees, or should it be existing circuit court judges appointed to that by the President?

Justice REHNQUIST. It is my view that in the long range it ought to be new judges appointed. The judges of the Court of Appeals for the Second Circuit did some careful thinking, and I remember reading their submission to—I do not know whether it was your committee or Congressman Kastenmeier's committee. And they came up with what I thought some very reasonable objection to the proposal as they understood it. And one of them was if the court is just temporary, the court is never going to establish the sort of reputation for excellence that would make its decisions followed by the courts of appeals. And it is going to be controversial with the courts of appeals anyway.

I think that is a valid point, that we are going to have to set up an institution that does have prestige and the dignity of brand new judges.

Senator DECONCINI. You think this is worthwhile doing it on a temporary basis to see whether the need is really there?

Justice **Rehnquist**. I think that would be a perfectly sensible way to approach it, Senator.

Senator **DeConcini**. I thank you, Justice.

Thank you, Mr. Chairman.

The **Chairman**. Thank you, Senator.

I think we will take a 10-minute break now. We will be in recess for 10 minutes.

[Short recess.]

The **Chairman**. The committee will come to order.

The distinguished Senator from Iowa.

Senator **Grassley**. Thank you, Mr. Chairman.

Justice Rehnquist, you stated in your confirmation hearings when you were up here to be Associate Justice, and that was back in 1971, that you would be able to separate your personal views from your role as a Justice when interpreting the Constitution. Now that you have been on the Bench for quite awhile, do you think that personal philosophy and judicial decisionmaking can be separated?

Justice **Rehnquist**. I do not suppose they can be entirely separated, Senator, since judges are human beings like everybody else. But certainly one mark of a good judge is the extent to which he is able or she is able to separate personal philosophy from judicial decisionmaking.

Senator **Grassley**. OK. To that extent, do you believe that you have been successful in separating these roles as a Supreme Court Justice?

Justice **Rehnquist**. Yes, I think I have.

Senator **Grassley**. On another point dealing with the legislative veto, I happen to be chairman of one of the subcommittees of this committee, and I have long been interested in issues dealing with the powers delegated to Federal agencies by the Congress and the extent, of course, to which Congress ought to be able to review regulations issued pursuant to that delegation of power. And I speak specifically then of the veto and an important means this is for Congress to check overreaching administrative agencies.

Now, you dissented in the *Chadha* case, though you did not join, as I understand it, Justice White's dissent for he generally defended the use of the legislative veto.

Now, I do not expect that you would respond to the constitutionality of specific legislative proposals pending before the Congress, and I appreciate your reluctance to discuss past cases as well. But I would like to ask you, if I could, along this line what your personal opinion of the concept of a legislative veto is and do you find anything repugnant in it?

Justice **Rehnquist**. Senator, I have some reservations about answering that question, and let me tell you what they are.

I think that when you have a nominee here who has not much of a prior judicial record, so that it is very difficult to figure out what their judicial philosophy would be. Perhaps the only way the committee has of getting at the nominee's possible judicial philosophy is to ask about personal views on things, thinking that no judge is going to completely succeed in separating personal views from the way they vote.

But, in my case, I have been on the bench for 15 years. As you point out, I voted in the *Chadha* case. I did not join the Chief Justice's opinion. I dissented. But, likewise, as you point out, I did not join Justice White's opinion.

I am very loath to give you, and I think I feel perhaps constrained that I cannot give you at the present time, but I think I did work with it when I was in the Office of Legal Counsel before I ever went on the bench, and I remember thinking at that time, as something that had kind of been worked out between Congress and the executives in a way that, you know, might raise considerable legal questions, but it struck me that, as a practical matter, it worked quite well.

Senator GRASSLEY. Well, do you personally feel it is a responsible way for Congress to deal with perceived unaccountability of agencies?

Justice REHNQUIST. Senator, I do not feel I can answer that now in view of the *Chadha* case.

Senator GRASSLEY. OK. Thank you. I respect your position that you are in, and so let me go on to something else.

Some jurists have suggested that the legislative history of a law is to be given little weight in interpreting the respective law.

Generally, how much weight should legislative history be given by the courts when interpreting law?

Justice REHNQUIST. I think the cases that have come down since I have been on the Court have pretty well established a general approach that, first, you look to the works of the statute that Congress enacted. And if those words are clear beyond per adventure of a doubt, in applying to the particular fact situation before you, you do not go to the legislative history to support any contrary claim.

But if there is ambiguity in the application of the words Congress used to these, then you can go to the legislative history to try to clear up the ambiguity.

Senator GRASSLEY. During his tenure, Chief Justice Burger spoke out frequently on judicial administration issues, such as lawyer advertising, frivolous lawsuits, and the quality of lawyers admitted to the bar.

What issues are you as Chief Justice going to take a leadership role on in your public pronouncements as head of the Federal judiciary?

Justice REHNQUIST. Well, Senator, I like to think when I do make those pronouncements, I will know more about those issues than I do now. Just because I have not been Chief Justice and have not really organized my thinking. But I think one of the most critical things in American society today is the cost of litigation, and the implementation in some places, but not everywhere, of alternative means for dispute resolution, the tremendous delays that people encounter in getting a dispute settled.

I think back to the time when I was in practice, when things were not nearly as congested and the courts were more accessible in the sense that you could get a case tried in 5 or 6 months if you filed it. And some of my clients, we were in a four lawyer firm, and some of our clients were quite small people. And I think to say a material man's lien claimant, a person who put some—either some labor or some material on a construction job, the contractor does not pay. So he has got a claim for $15,000 or $20,000 against the contractor.

You walk into any good sized law firm nowadays and they will tell you no, we just cannot handle your case. It would cost you more than $20,000 to have us litigate it.

Now, some people have kind of scoffed at alternative dispute settling means as kind of a denial of access to the courts. But I know from some of the clients I had back in practice, they wanted their disputes settled. They would have even accepted a negative decision sometimes. But the idea of paying nearly as much as what is involved in order to get a judgment was what really angered them. And, you know, I think that is a real concern that I hope to look into as Chief Justice.

Senator **Grassley**. Well, those are very worthy areas to work in. And if you can accomplish some progress in that area, you will be making a very real contribution.

Let me ask a little bit about the workload of the Court and some suggestions that have been made for maybe reducing that workload.

Would you favor legislative changes in the statute on diversity jurisdiction as a way to reduce the Court's workload?

Justice **Rehnquist**. I am reluctant to comment on statutory things except in the area that you picked out, which seems to be so closely related to the way the courts function, that I could not be criticized for responding.

I have mixed feelings. I think analytically diversity jurisdiction ought to be repealed. It exists solely by reason of the fears in the early days of the United States that a State Court judge in Iowa could not be fair to a litigant from Missouri. And I simply do not think that there is much ground for that any more.

But I have talked to people around the country, and the Bar Associations in the West, I was looking up for Senator DeConcini, because I think the Arizona Bar Association and many of the Bar Associations in the small Western States have taken the position they do not want diversity repealed. Perhaps Iowa has too. And when you start asking them why, they like the option of having two courts. And they generally have the feeling that because the State Court judges are paid less than the Federal judges, that the Federal judges, by and large, are going to be somewhat better judges.

And I have also talked to a number of the judges in the lower Federal court, the courts of appeals, and the District Courts, and a lot of them, although they concede analytically diversity jurisdiction should be repealed, they said I would rather try a diversity case than a title VII case, or some other kind of a statutory case because it is more interesting. Or it is the only chance I have to see 90 percent of the lawyers that come into my court is diversity jurisdiction, because that is the only kind of cases that most lawyers in the State have.

So I am not sure that you can just say analytically it ought to go contrary to the wishes of a lot of the judges and a lot of the people who think they are benefitting from it.

Senator **Grassley**. At the very least, I hear you saying it does not serve the practical purpose it did at one time in our history.

Justice **Rehnquist**. I do not think it does, although people have argued with me about that too.

Senator **Grassley**. Some Supreme Court historians have criticized the Burger Court for failure to establish a common body of law in many areas. They might pick out criminal procedure and affirmative action as a couple.

The criticism is that the Supreme Court has qualified its holdings too much to fit the specifics of each fact intensive situation.

How important do you believe it is that the Court attempt to lay down bright line rules?

Let me follow up with whether or not you would be steering the Court down such a path in your position as Chief?

Justice **Rehnquist**. I do not think I would have much success in steering the Court down any path that my colleagues did not agree with me on.

And on the bright line rules, there is no question but what the typical practicing lawyer, the typical trial judge is going to get more satisfaction out of a case enunciating a bright line rule than out of a case which has a lot of ifs, ands and buts in it. And yet when a case comes to our Court, in some cases we will find we have laid down a bright line rule that sounds great. Then it comes back on slightly different facts, and some of the people who joined it before say, well, gee, if I had known it was going to be this kind of a thing, I would not have subscribed quite that broad language, and it ends up qualified.

I think that, Senator, is the nature of the judicial process.

Senator **Grassley**. Reportedly you have said that you agree with Chief Justice Burger that the Supreme Court has built too high of a wall between separation of church and State.

Is this an accurate characterization of your views on this aspect of the First Amendment?

Justice **Rehnquist**. It is an accurate characterization of the views I expressed in my dissenting opinion in *Wallace* against *Jaffrey* last year, yes.

Senator **Grassley**. OK. Now, referring to the *Jaffrey* case, you stated that the establishment clause should extend no further than the prohibition on establishing a State religion.

In your personal view, what exactly are the boundaries of the establishment cause in regard to religious activity in State-controlled institutions?

Justice **Rehnquist**. Senator, with all respect, I feel that since this is a case that—the kind of issue that constantly comes before the Court, I must respectfully decline to answer.

Senator **Grassley**. And do not smile when I refer to the ninth amendment. I would like to focus on that or the protection of unenumerated rights for just a minute.

No specific right is actually mentioned in that amendment, as you obviously know.

Exactly what specific rights do you think the framers intended to protect under this amendment?

Justice **Rehnquist**. Senator, you are going to find me obnoxious, I am sure, because there was at least a concurrence, I think, in one of the contraceptive cases that said there was a penumbra of rights that perhaps flowed partly from the Ninth Amendment, and just because we recently had a case of *Bowers* against *Hardwick*, I forget whether the ninth amendment was directly involved, but it was the same type of case.

I just feel I can't answer as to my personal views because I have participated in some cases and they are bound to come again.

Senator GRASSLEY. Well, do some unenumerated rights exist that have not yet been defined?

Justice REHNQUIST. Certainly—that have not yet been defined?

Senator GRASSLEY. Yes.

Justice REHNQUIST. I think the only correct answer to that is that it may develop, as future decisions come down from the Court, that just what you suggest will happen. But it simply can't be predicted one way or the other profitably now.

Senator GRASSLEY. What is your view on what the framers intended when they drafted article III, section 2, where the Supreme Court has appellate jurisdiction, where it says "with such exceptions, and under such regulations as the Congress shall make"? In other words, do you think that it was intended for Congress to have authority to actually restrict Supreme Court jurisdiction?

Justice REHNQUIST. I know there have been bills to that effect pending in Congress. There is a case decided right after the Civil War, and let me think——

Senator GRASSLEY. The *McCardle* case.

Justice REHNQUIST. Correct, right, ex parte *McCardle*—where the Court seemed to say that Congress did have that power. In fact, it didn't seem to say it; it said it, I think.

But then there has been a great deal of, I think, quite hostile criticism of the *McCardle* case, not from our Court, I don't believe, but from scholars and commentators. And just because that kind of bill has been pending here, again, I don't feel I can express a view on the authority of Congress under article III, section 2.

Senator GRASSLEY. What is your opinion of television coverage of the Supreme Court?

Justice REHNQUIST. Under television coverage in the Supreme Court, if the lights shine in the eyes of the lawyers, the way these lights shine in my eyes, for the sake of the lawyers I would be against it.

I have a feeling—and I thought about that, Senator, because I sat back there for a couple of hours this morning, and if I were a lawyer arguing before the Supreme Court, with these sort of lights on me, trying to make contact in my argument with nine Justices, I would be kind of unhappy.

If I were convinced that coverage by television of the Supreme Court would not distort the way the Court works at present, I certainly would give it sympathetic consideration. But if it meant a whole lot of lights that would disturb the present relationship between lawyers and judges and arguing cases, I don't think I would be for it.

Senator GRASSLEY. Do you support television coverage of Court proceedings?

Justice REHNQUIST. I participated in the *Chandler* decision that the Chief Justice wrote a number of years ago, saying that where Florida had provided that, there was nothing in the Federal Constitution that prevented it. So I suppose you would say from that that each State is free to chose for itself.

Senator **GRASSLEY**. I'm done with my questioning, and I see we have a vote on.

Mr. **SHORT**. Yes, sir, if we could recess.

Senator **GRASSLEY**. Do you want me to recess?

Mr. **SHORT**. If you would, please.

Senator **GRASSLEY**. We will recess the committee meeting until the chairman returns after the vote on the floor of the Senate.

[Whereupon, the Committee was in recess.]

The **CHAIRMAN**. The committee will come to order.

The distinguished Senator from Vermont.

Senator **LEAHY**. Thank you, Mr. Chairman. I appreciate the chairman's indulgence while we had to go and vote.

Judge Rehnquist, we discussed earlier the fact that you spend part of the year in my own State of Vermont—that's in Greensboro, VT, is it not?

Justice **REHNQUIST**. Yes, it is, Senator.

Senator **LEAHY**. And am I correct that you have—that you and Mrs. Rehnquist actually have a summer home there?

Justice **REHNQUIST**. Yes, we do.

Senator **LEAHY**. When did you purchase that?

Justice **REHNQUIST**. In 1974, I believe.

Senator **LEAHY**. Justice Rehnquist, I am told that you have a warranty deed, the normal form of transfer in Vermont, and gave back a mortgage deed. But in the warranty deed there is this sentence: "No fee to the herein conveyed property shall be leased or sold to any member of the Hebrew race."

Are you aware of that covenant in your deed?

Justice **REHNQUIST**. Not at the time, Senator. I was advised of it a couple of days ago.

Senator **LEAHY**. Did you not read the deed that you got on your property?

Justice **REHNQUIST**. I certainly thought I did, but I'm quite sure I didn't note that.

Senator **LEAHY**. This is not a very lengthy document, is it?

Justice **REHNQUIST**. I don't recall, not having it in front of me. I relied on a lawyer in St. Johnsbury to close the title.

Senator **LEAHY**. You signed the mortgage deed back?

Justice **REHNQUIST**. I'm sure I signed whatever deeds were necessary to sign.

Senator **LEAHY**. Would you be surprised to hear that the deed is basically a boilerplate printed deed, but then the items of description of your property and this restricted deed are typed in?

Justice **REHNQUIST**. No, I wouldn't be surprised.

Senator **LEAHY**. And you do not recall reading that "No fee to the herein conveyed property shall be leased or sold to any member of the Hebrew race"?

Justice **REHNQUIST**. No, I don't.

Senator **LEAHY**. And you just heard about this 2 days ago?

Justice **REHNQUIST**. Yes.

Senator **LEAHY**. What was your reaction when you heard about it?

Justice **REHNQUIST**. I was amazed.

Senator **Leahy**. As a lawyer, how do you feel about that language?

Justice **Rehnquist**. Well, I think it's unfortunate to have it there. But it's meaningless in today's world, I think.

Senator **Leahy**. Why is it meaningless?

Justice **Rehnquist**. The covenant is unenforceable under Federal constitutional law and I think under Federal statutory law.

Senator **Leahy**. I should note for the record that it is also illegal under—or it's invalid under Vermont law, title 13, section 1452, VSA.

So it is your opinion there is no legal effect of that being in your deed?

Justice **Rehnquist**. Oh, certainly.

Senator **Leahy**. Will you do anything to have that language removed from your deed?

Justice **Rehnquist**. Did I do anything——

Senator **Leahy**. No; would you—will you?

Justice **Rehnquist**. I don't know exactly what the point of having it removed from the deed would be, other than to get rid of something that is quite obnoxious, because it's unenforceable now. Is there some procedure under Vermont law where one could have it removed?

Senator **Leahy**. I would assume you could go through a straw man and a quick claim back.

I mean, do you not see a question of appearance, if it is noted that the Chief Justice of the U.S. Supreme Court has a restricted deed in his property?

Justice **Rehnquist**. Yes. Yes; I certainly do. And if there is a procedure under Vermont law where one could avoid it or get rid of it, I would certainly go through it.

Senator **Leahy**. Thank you.

I must admit that I was also surprised to see that, because in my own experience of years of private practice, I never once saw a deed go through with a restrictive covenant. In fact, in our law office, I can't imagine even representing somebody who would want to put that in. But I appreciate and accept your statement that you would move to get rid of it.

Mr. Justice, in 1971, you gave a speech before the National Conference of Law Reviews, and you said you did not believe there should be any—and I quote—"judicially enforceable limitations on the gathering of this kind of public information by the executive branch of the Government." And "this kind of public information" you were referring to was the collection and storage by law enforcement personnel of public information about individual Americans.

Do you still hold that same view?

Justice **Rehnquist**. You're talking about simply viewing people in public places?

Senator **Leahy**. You said there shouldn't be any judicially enforceable limitations on the gathering of public information by the executive branch of the Government. I understood your speech to say that you could not think of any kind of judicially enforceable limitations, that I would assume there might not be any cases where that would be possible, to have judicially enforceable limitations.

Justice **Rehnquist**. Well, I think at that time I perhaps wasn't aware of a case that I later became aware of, and it must have been shortly afterwards, because I think a similar question was asked in my 1971 hearings. There was a case decided in the Federal court in Chicago, I think, that suggested that if there was an element of harassment about the information gathering, that that would be judicially enforceable. I certainly agree with that case.

Senator **Leahy**. What about the advent of modern computer technology, this ability to prepare and collect and build up enormous, almost an Orwellian dossier on people; does that change your views in any way?

Justice **Rehnquist**. Well, if we're talking about the Constitution, I'm not sure that it does. But it seems to me that's what we have to count on legislatures and Congress for, to regulate where regulation is necessary.

Senator **Leahy**. At the Constitutional Rights Subcommittee hearings in 1971, when you were a witness for the Department of Justice, you may recall—there's been a lot of discussion since—about Senator Ervin discussing the incidents where Army intelligence officers are pretending to be photographers and took pictures of individuals at antiwar rallies and then compiled dossiers on them.

You testified at the time the activity was a constitutional stature, but you are saying that this activity, while perhaps wrong, did not violate the first amendment rights of those individuals at the rallies.

Do you still feel that way?

Justice **Rehnquist**. Senator, I am reluctant to answer that question because we have had a couple of cases involving surveillance of people in public places come before the Court, the *Knotts* case and in the *Carroll* case. They weren't precisely in this context, but it seems to me that I really have to draw back there.

Senator **Leahy**. Well, let me ask you this.

Suppose the person that is carrying out the investigative activity, instead of a member of the executive branch or elected official, rather than photographing antiwar protesters, he or she is photographing black voters entering a polling place, with voters claiming they're being intimidated by that activity. If the black voters brought a case in Federal Court, would there be a justiciable controversy under the 15th amendment in your mind?

Justice **Rehnquist**. Senator, I honestly feel that I can't answer that question. It's the kind of thing that might come before the Court.

Senator **Leahy**. Well, let me go into an area that did come before the Court and involved you, and that's the *Laird* v. *Tatum* case.

You had refused to recuse yourself in that case. At the time when you refused to recuse yourself, you acknowledged that you had served in the capacity of an expert witness for the Justice Department during congressional hearings that concerned, among other things, domestic military surveillance. During those hearings you made statements concerning the *Laird* case which was pending then in the court of appeals, and you said they were merely personal interpretations of the Constitution. I think I'm accurately describing the situation.

Now, here is a quote from the exchange with Senator Ervin. Senator Ervin said,

> You do take the position that the Army or the Justice Department can go out and place under surveillance people who are exercising their First Amendment rights, even though such action will tend to discourage people in their exercise of those rights?
>
> Mr. **Rehnquist**: Well, to say that I say they can do it sounds either like I'm advocating they do it or that Congress can't prevent it, or that Congress has authorized it, none of which propositions do I agree with.
>
> My only point of disagreement with you is to say whether, as in the case of Tatum versus Laird, which has been pending in the Court of Appeals here in the District of Columbia, that an action allowed by private citizens to enjoin the gathering of information by the executive branch, where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.

Were you saying at the time of those hearings that the *Laird* case presented a nonjusticiable controversy?

Justice **Rehnquist**. Senator, the transcript of the hearings would certainly be the best version of what I was saying at the time. I don't recall it now, at the time, but I am sure the transcript you're reading from is accurate.

Senator **Leahy**. Assuming that that is accurate, doesn't that say, in effect, that you are concluding that the *Laird* case presented a nonjusticiable controversy?

Justice **Rehnquist**. The term "nonjusticiable" troubles me because it could be taken to mean something that, although there is a constitutional violation, the courts can't remedy it. I don't think that's what I was meaning to say.

Again, just trying to interpret portions of the transcript you read, I think it certainly could be interpreted to say that, under those circumstances, there was no constitutional violation.

Senator **Leahy**. But weren't you saying, as an expert witness, the same thing that you then handed down or didn't vote on in the decision in *Tatum* v. *Laird* when it came to the Supreme Court?

Justice **Rehnquist**. I want to make sure I understand your question. You're not talking about my remark about Tatum against Laird as a case during that hearing, but you're talking about the statement I made about the more general proposition?

Senator **Leahy**. No; I'm talking about your statement about *Tatum* v. *Laird*. You discussed *Tatum* v. *Laird* in the Ervin hearings. You subsequently voted on or were the ruling opinion in *Tatum* v. *Laird*—in fact, it could be said that you or any of the five who were in the majority would be the swing vote in that case. You had been asked to recuse yourself and you said there was no need to recuse yourself, and yet you discussed it in the form of an expert witness before the Ervin hearings before.

What I'm saying is, had you not in those hearings, in effect, stated what would be the decision, your decision, in *Tatum* v. *Laird*, and if that was the case, should you not have recused yourself in *Tatum* v. *Laird*?

Justice **Rehnquist**. Should I have recused myself?

Senator **Leahy**. Yes.

Justice **Rehnquist**. As you know, Senator, I wrote a fairly lengthy opinion explaining why I didn't think, under the law applicable then, I ought to have to recuse myself, because I didn't think the law required that simply the public statement of a view prior to going to the bench foreclosed one's consideration of the issue, even though the same view was involved in a litigated case.

I realize people might disagree with me, but that was the position I took in that case.

Senator **Leahy**. Do you have any second thoughts about that position?

Justice **Rehnquist**. I never thought of it again until these hearings, to tell the truth. I have gone back and read the opinion, and I think, under the statute as it was changed after *Laird* v. *Tatum*, I think there would be probably a very strong ground for disqualification. But I didn't feel dissatisfied with the way I had behaved under the statute as it then stood.

Senator **Leahy**. In your memorandum you said that you felt you were not disqualified based on the statute then—in other words, prior to being amended, the action you just referred to. But you said also you would not give separate consideration to the ABA standards of judicial conduct, saying that you didn't read them as being materially different from the standards in the congressional statute.

But then, a couple of years later, and before the New York City Bar, you referred to those standards as being more stringent.

Justice **Rehnquist**. Justice Stewart, who was a good friend of mine, I remember, after I wrote this opinion—you know, it may have been months afterwards—he had been on the drafting committee of the ABA standards, and he told me that in some respects he thought my comparison of the ABA standards and the statutory standards was incorrect and that the ABA standards had intended to be more stringent.

Senator **Leahy**. Looking at the ABA standard, if that was what you had used as your guide, would you have recused yourself?

Justice **Rehnquist**. I just can't put myself back in that position, Senator, not having the ABA standards in front of me. I really just can't answer.

Senator **Leahy**. Let me ask you this. This would not be a subjective thing, but let me ask you an objective question:

Did you have personal knowledge of the disputed evidentiary facts in *Laird*?

Justice **Rehnquist**. No.

Senator **Leahy**. When you were in the Justice Department, did you have knowledge about the military's domestic surveillance policy?

Justice **Rehnquist**. I had—if you would consider information obtained in the course of preparing for the May Day demonstrations, which did involve some military activity, I suppose you would say yes.

Senator **Leahy**. But you deny, you were not aware of the evidenciary, or the disputed evidenciary facts?

Justice **Rehnquist**. No.

Senator **Leahy**. In 1975, Senator Ervin wrote a letter, saying that you should have disqualified yourself from participating in that case because you had acted as counsel for the Defense Department in a hearing before the Senate Subcommittee on Constitutional Rights. Are you aware of that letter?

Justice **Rehnquist**. No. I am not.

Senator **Leahy**. I will ask staff to make sure a copy of the letter be given you. Once you have had a chance to read it, then I would ask, Mr. Chairman, to have unanimous consent to have the letter included in the record in connection with the testimony and my questions.

The **Chairman**. Without objection.

[The letter follows:]

United States Senate
WASHINGTON, D.C. 20510

Morganton, North Carolina 28655
June 26, 1975

LOUIS MENAND, III
ROOM 3-234
JUL 1 1975
file:
refer to:

Professor Louis Menand, III
Department of Political Science
Room 3-234
Massachusetts Institute of Technology
Cambridge, Massachusetts 02139

Dear Professor Menand:

This is to thank you for your letter of June 19, 1975, and the copy of your letter to the Senate Subcommittee on Constitutional Rights which accompanied it.

I have never been able to understand why Chief Justice Burger said so much about the destruction of the surveillance records acquired by the Army during its spying on civilians in his opinion in Laird v. Tatum. The only question before the Supreme Court in that case was the sufficiency of the complaint to state a cause of action. Four of the Justices combined with Justice Rehnquist, who ought to have disqualified himself from participating in the case because he had acted as Counsel for the Defense Department in the hearing before the Senate Subcommittee on Constitutional Rights, held the complaint to be insufficient.

Solicitor General Griswold argued the case for the Defense Department, and repeatedly invoked affidavits which had been offered by the government in the District Court in opposition to a motion of the plaintiff for a temporary restraining order although these affidavits had no relevancy whatsoever to the point being considered by the Supreme Court, as I pointed out to the Supreme Court. Nevertheless, the Solicitor General got away with this, and Chief Justice Burger's opinion is based in large part on what the government said and not on what the complaint alleged.

The suit was a suit for an injunction to prevent threatened injuries. The Chief Justice treated it as if it was a suit for damages, and held that the plaintiff could not maintain the suit unless he could show he had suffered an injury -- instead of the threatened injury which was sought to be averted. I am glad that you have asked for an investigation.

Sincerely yours,

Sam J. Ervin, Jr.

Sam J. Ervin, Jr.

SJE:mm

Senator **Leahy**. Justice Rehnquist, on another area, the Chief Justice is known for his adamant coverage to television coverage of Supreme Court proceedings. Knowing what it has done to the cave of the winds over here, now that we have had it for a few months in the Senate, I can somewhat understand some of his feelings.

But let me ask you: As Chief Justice, what would your view be of television coverage of arguments, or proceedings before the Supreme Court?

Justice **Rehnquist**. Senator, I responded to Senator Grassley a little——

Senator **Leahy**. I am sorry. I missed that.

Justice **Rehnquist** [continuing]. That if the lights came down in the face of the lawyers in the Supreme Court, the way the lights come down on the face of the witnesses here, I would have real reservations about it. Because our operation is a fairly small one; it is fairly intimate between the lawyers and the judges.

If television coverage would not distort the way the Court now operates, I would certainly give it sympathetic consideration.

But if it turns out to be just to make it a totally different ballgame, I would have real reservations.

Senator **Leahy**. So that you would not have any objection to it if they are able to put, some way of putting the coverage in there in an unobtrusive fashion without these lights?

Justice **Rehnquist**. Yes. Unobtrusive, in the view not of the television people, but of the Justices.

Senator **Leahy**. That is what I mean. Having come here and seen how these lights work, I now have more sympathy for some of the people who had a chance to meet me in less than favorable circumstances, when I was a prosecutor, in lineups. Thank you. Thank you, Mr. Chairman.

The **Chairman**. Thank you, Senator. The distinguished Senator from Pennsylvania.

Senator **Specter**. Thank you, Mr. Chairman. Mr. Justice Rehnquist, the relay questioning which you have been subjected to here today, is somewhat reminiscent of some Supreme Court decisions, *Ashcraft* v. *Tennessee*. I think it may be that defendants in proceedings have more rights than nominees, even if they are Associate Justices of the Supreme Court. The questioning has gone on by relay, longer than I think the Supreme Court precedents would permit that kind of drilling by district attorneys or by police detectives. But we are proceeding to try to move ahead as fast as we can.

Let me start with the very basic proposition that I believe you have already responded to, but one that I think is important to put on the record. And that is the binding precedent of *Marbury* v. *Madison*, 1803. That the Supreme Court of the United States is the final arbiter, the final decisionmaker of what the Constitution means.

Justice **Rehnquist**. Unquestionably.

Senator **Specter**. So that if the Supreme Court has ruled on a legal issue, the executive branch, the legislative branch, have a responsibility to observe the decisions of the Supreme Court of the United States on a constitutional matter?

Justice **Rehnquist**. Yes. I think they do.

Senator Specter. Let me now turn to the subject of the jurisdiction of the Court, a question which is of great concern, and it bears upon the first issue as [illegible] the binding authority of the Supreme Court of the United States to interpret the Constitution.

There may be some effort to undercut the final authority of the Supreme Court by saying that the Court has no jurisdiction on a given issue. If the Court cannot interpret the Constitution or apply a remedy, then the Court realistically is unable to carry out the function of constitutional interpretation, as I think *Marbury* v. *Madison* requires.

Do you think that the jurisdiction of the Court can be limited, for example, on the first amendment right of freedom of speech?

Justice Rehnquist. Senator, as you know, I am sure, as well as I, there was a case right after the Civil War, ex parte McCardle, that held that Congress could limit the jurisdiction of the Supreme Court; even require that a case which had already been submitted to the Justices for decision, be dismissed.

Since that time, there has been a lot of scholarly criticism, criticism from commentators, something along the lines I think your question suggests. That this thing cannot just be allowed to sweep away the power of the Court to finally adjudicate cases.

I know there have been bills pending here, in the last 2 or 3 years, testimony as to their constitutionality, and I feel I cannot go any further than that, for fear that that sort of issue will come before the Court.

Senator Specter. Well, Mr. Justice Rehnquist, I am very sensitive to the issue as to commenting on matters which may come before the Court. It seems to me, however, that when you deal with the issue of the ultimate authority of the Court to interpret the Constitution, which is bedrock in our society—I do not think you can find a more fundamental principle—that if you can undercut the authority of the Court, by saying that there is no jurisdiction, then *Marbury* v. *Madison* is really meaningless. As a lawyer of some 30 years standing, I think it is very important for the committee—and I think for the whole Senate—to really get an idea as to your judicial approach on an issue which is that fundamental, and that important.

Justice Rehnquist. Senator, as you can imagine, I would like to oblige, but the fact that the issue is fundamental, and important, does not make it any less one that could well come before the Court. And I think that the approach I have to take is, in a case like that, I ought not to attempt to predict how I would vote in a situation like that.

Senator Specter. Well, suppose the issue of *Marbury* v. *Madison* comes before the Court again. Suppose there is a challenge made by the President of the United States; that he asserts that he is separate but equal, and does not have to obey the decision of the Supreme Court of the United States. Have you already foreclosed that situation?

Justice Rehnquist. Well, I think this type of question, like most other questions that lawyers and judges deal with, has elements of degree about it. Whether Marbury against Madison is good law is something that—no one has challenged Marbury against Madison, it seems to me, for a century, perhaps, you know, nearly two centuries.

I do not think that the question you pose is quite the—in light of the *McCardle* case, is quite as totally free from doubt as Marbury against Madison.

Senator SPECTER. Well, what is there to *Marbury* v. *Madison*, which says the Supreme Court makes the decision on constitutional issues, if the Congress can say the Court has no jurisdiction over a constitutional issue?

Justice REHNQUIST. Well, there would certainly be some loggerheads there. It might put Congress at loggerheads with—I suspect it would—with the Court.

Senator SPECTER. Well, that is easy. If the Congress is at loggerheads with the Court, the Court wins, as long as *Marbury* v. *Madison* is the law of the land.

Justice REHNQUIST. Well, perhaps it is easy, Senator, and I realize the arguments you advanced are persuasive ones, but even if the question is easy, I do not think that permits me to indulge in speculation about its outcome.

Senator SPECTER. Well, Mr. Justice Rehnquist, I am sensitive to the issue about your not being asked to comment on cases which may come before you. But it seems to me, with all due respect, that a nominee for the Supreme Court should be willing to give his or her views on something which is as fundamental as the authority of the Court to decide constitutional issues.

Justice REHNQUIST. Senator, I understand your position, and I honestly feel that I must adhere to my view that it would be improper for a sitting Justice to try to advance an answer to that question.

Senator SPECTER. Well, let me carry it just a moment or two further. Beyond McCardle, in the case of *United States* v. *Klein*, decided in 1871, so it is an old case, the Supreme Court of the United States held unconstitutional a particular congressional statute limiting the appellate jurisdiction of the Supreme Court and the original jurisdiction of the Court of Claims.

And I realize, Mr. Justice Rehnquist, that notwithstanding your extraordinary record of scholarship, that you cannot have all the Supreme Court cases in your head. Would the doctrine of *United States* v. *Klein* perhaps settle the question of the jurisdiction of the Court, making clear that the Congress could not take away the jursidiction of the Court, or do you still feel it is an open question which might come before you?

Justice REHNQUIST. Well, when I say open question, Senator, I do not mean one that is 50-50, or something like that, that are equally plausible arguments on both sides. Just it is a question not settled totally by a precedent, that could very easily come before us.

Senator SPECTER. Well, between now and the time of my next round, if it is tomorrow, or if it is today, I am going to go back and do some more research on the issue of appropriate questions to ask, because this matter is of great concern to this particular Senator.

In effect, you say there is an open question as to whether the Congress can limit the jursidiction of the Court to decide a first amendment question of freedom of speech or freedom of press. Is that a fair statement?

Justice REHNQUIST. Yes. I think it is.

Senator SPECTER. Well, I would find that of considerable concern, if the Congress can do that. The Congress did——

Justice REHNQUIST. Well, I would find it of considerable concern, too, Senator. But that does not make me feel that because I would feel it was wrong, or mistaken, that one would automatically come to the conclusion that it was unconstitutional.

Senator SPECTER. Well, there are certain principles which, at least in my view, are so fundamental as to require a statement, or an understanding as to where a person stands. I understand the competing consideration of not asking you to discuss or comment on cases which may come before the Court.

Justice REHNQUIST. I would certainly, you know, reconsider my answer—I do have the feeling, and I may be wrong, that Justice O'Connor, in her confirmation hearings, was asked similar questions, and I believe she took much the same position that I am taking.

Senator SPECTER. I do not believe she was, but I will check it. I was present at Justice O'Connor's confirmation hearings, although not for as long as Justice O'Connor was present during her own testimony. I am concerned about this issue because there is a move, through the route of limitation of jursidiction, as I see it, really, to undermine *Maibury* v. *Madison*. That is why I pressed it to the extent that I have, and I would ask you to reconsider it. We will take a look at Justice O'Connor's testimony and we will take a look at some of the precedents on the appropriate scope of questioning in other proceedings, and follow up on it.

Mr. Justice Rehnquist, on the issue of the incorporation doctrine, that is, the extent to which the 14th amendment of the U.S. Constitution, through its due process clause, picks up prohibitions within the Bill of Rights, I have noted your opinion in *Trimble* v. *Gordon*, where you express some doubt as to the first amendment being fully incorporated in the due process clause of the 14th amendment.

And I would ask you, if you recollect the case, what your position is on that issue?

Justice REHNQUIST. I do not recall it in *Trimble* against *Gordon* but I remember writing to that effect in a couple of other cases: the *Buckley* against *Valeo* case, and I think the *First National Bank of Boston* versus *Valati*. And the position I took there, and I think I took it without any support from my colleagues, but it was following a view held by the second Justice Harlan and by Justice Jackson, for whom I clerked, and I think by Justice Holmes at one time—was that the freedom of speech and press clauses were directed against—by their terms, directed against Congress. And that the 14th amendment carried over the general prohibitions of those clauses against the States, but not with, necessarily, the same specificity.

And in *Buckley* against *Valeo*, I wrote it, a partial dissent from a rather small part of the opinion, because I expressed a view there, that whereas the States had, if there were going to be elections at all, there had to be State regulation of the ballot process, when you vote, how you get on the ballot, and that sort of thing. And there were precedents from our courts saying that there was a fair amount of latitude on the part of the States to favor a system which favored the two major parties—the Democrats and the Republicans at the expense of splinter parties.

And the position I took in Buckley was that that was perfectly good for the States who had to regulate ballots, but that the Federal Government was more restricted by the first amendment, because if there were going to be elections the States had to step in and establish the process. The Federal Government did not have to regulate the things it regulated in Buckley, in order for elections to take place at all. And so I felt that the Federal statute—and expressed the view in the dissenting opinion—discriminated, unconstitutionally, in favor of the Republican and Democratic Parties against the splinter party.

Senator SPECTER. Well, Mr. Justice Rehnquist, as to the scope of the due process clause—of course the due process clause of the 14th amendment says nothing about freedom of speech. I have read your statements on the issue, where you have said that it is a matter of trying to reconstruct the intent of the framers at the time. And it is a very difficult job, obviously, to undertake that.

But how do you, in interpreting the breadth of the due process clause, come to that kind of a delineation, when you are seeking the intent of the framers of the 14th amendment? How can you separate off first amendment speech rights, how can it really be severable?

Justice REHNQUIST. Well, if you are looking at the language of the due process clause, as I recall it, Senator, it says: "No State shall deprive any person of life, liberty or property without due process of law."

And the question then becomes, you know, as you know perfectly well, what is included under liberty, or, what provisions from the Bill of Rights are carried over by that language? And I would say that, from the language itself, it is not evident that any particular provisions are carried over, not inexorable; but if you look at the word liberty, and you wonder what kind of liberty are they talking about, surely one liberty was freedom of speech, freedom of the press.

So, it seems to me it is quite natural to carry those over. But I do not know that the language of the due process clause, nor necessarily, what I happen to recall about the debates, and that sort of thing, necessarily indicates that the full rigors of the first amendment as applied to Congress, necessarily were to be applied to the States.

Senator SPECTER. Well, the difficulty with that, it seems to me—and I am just probing to get your line of reasoning on it—is that it is so speculative. If you are picking out a portion of the first amendment, the freedom of speech—if you seek to avoid putting your own personal views, as they arise in a case, which I know you have testified in the 1971 proceedings, that you are very much opposed to—how can you really separate the various aspects of something as fundamental as speech?

Isn't it really all in there? Once you say that the due process clause incorporates freedom of speech under the first amendment, isn't that all there is to it? How can you separate any of it out as not incorporated?

Justice Rehnquist. Well, if you say that the due process clause incorporates and makes applicable against the States, the first amendment in haec verba, so to speak, the question is answered. If it does that, it does carry it over in precisely the terms that it is applicable to Congress against the State.

But I think the argument on the other side, is that—and I think this is made very well in Justice Jackson's dissent in the *Beauharnais* case—is that there was a good deal of understanding of what freedom of speech meant at the time the Constitution was adopted, that was undoubtedly applicable against the States, but that there were perhaps slightly more latitude allowed to the States than were allowed to the Federal Government.

Justice Harlan took that position in his opinion in the *Roth* case. That the States could proscribe certain kinds of obscenity but that the Federal Government could not.

Senator Specter. Mr. Justice Rehnquist, at the risk of asking questions which may come before the Court, I think these are pretty well established principles, but, there is considerable concern on the part of this Senator about the applicability of the due process clause of the 14th amendment to certain fundamental liberties, as embodied in the first 10 amendments.

And I would like to ask your view as to the inclusion of the free exercise of religion in *Cantwell* v. *Connecticut.* It was a unanimous opinion. Does that matter rest, so far as you are concerned?

Justice Rehnquist. Most certainly, yes.

Senator Specter. And the establishment clause in *Everson* v. *Board of Education?*

Justice Rehnquist. No. I think I criticized the *Everson* case in my dissent in Wallace against Jaffrey, not for the result it reached at all, but for its use of the term "wall of separation between church and state," which I felt was simply not historically justified.

Senator Specter. Well, the red light is on. May I have leave to ask one final question, Mr. Chairman?

The Chairman. Yes.

Senator Specter. And I will come back to this line later. And this is somewhat less philosophical or constitutional than the matters I have been discussing with you, but there are some people very interested in this in Pennsylvania.

Mr. Chief Justice Burger said that he would take the Supreme Court for a sitting in Philadelphia in 1987, where the Supreme Court once sat, probably still should. My question to you, Mr. Justice Rehnquist, is whether you would honor that commitment?

Justice Rehnquist. I would certainly make every effort.

Senator Specter. Thank you. Thank you very much, Mr. Justice. Thank you, Mr. Chairman.

Senator Biden. Delaware was the first State, Mr. Chief Justice. We would like to talk to you about that.

The Chairman. The distinguished Senator from Alabama.

Senator Heflin. Several, or two have questioned you about TV in the Supreme Court. You mentioned the lights. I would suggest that you go down and look at the Supreme Court of Alabama and see how they have arranged the lighting in regards to TV coverage. I do not think you have any conflicts of fair trial, free press issues, that would arise with an appellate court argument, and I think that sometimes maybe the U.S. Supreme Court can learn from the State courts.

I think it might be interesting to see how it has worked there. It has worked quite well.

I want to pursue a little bit more about this issue that has arisen: the role of the first amendment as opposed to the role of an Associate Justice, that we have outlined either through questions to you, or to other witnesses relative to that role.

The leadership on the Court is one, and the leadership of the entire judicial system is another area. On the Court, there has been a good deal written about a consensus builder, the first amendment and the Chief Justice as a consensus builder.

I have read with interest a speech that you made, which is published in Constitutional Commentary, the summer issue of 1985, that was at the University of Minnesota Law School, where you were the jurist-in-residence there in October 1984, entitled, "Presidential Appointments to the Supreme Court."

In it you trace somewhat the history of various Presidents as they had the opportunity to appoint a good number of the members of the Supreme Court, and, in doing so, attempted to appoint Justices of their philosophy and ideology.

Two come to mind from reading it: Lincoln and Roosevelt. There were a number of factors that took place. For example, with Roosevelt, a number of deaths took place, so really, they did not live to fulfill what he perhaps had as his desire to the way they would interpret the Constitution and the statutes that were passed by Congress.

Then in your article, you say that a second series of centrifugal forces is at work within the Court itself, pushing each member of the Court to be thoroughly independent of his colleagues.

The Chief Justice has some authority that Associate Justices do not have, but this is relatively insignificant compared to the extraordinary independence that each Justice has from each other Justice. And it goes on in the article, and then, in the closing paragraph, you indicate that, "An appointment to the Supreme Court is immediately beset with institutional pressures," which you had described, and he identifies more and more strongly with the new institution of which he has become a member, and he learns how much store is set by his behaving independently of his colleagues.

I believe these institutional effects, as much as anything, have prevented even strong Presidents from being any more than partially successful when they sought to, quote, "pack in," unquote, the Supreme Court.

Now those unusual pressures that are within the Court to push a member of the Court to be independent of other Justices, would you elaborate a little bit more on that?

Justice **Rehnquist**. Yes. I will try to, Senator. One occasionally, looking back at times where the Chief Justice has changed, whether it was Hughes to Stone in 1941, or Stone to Vinson in 1946, and you will read press accounts, that the new Chief Justice is expected to "harmonize" the Court and resolve the disputes. He will clear up these five to four decisions, because he is a great negotiator, and that sort of thing.

Most predictions have just never come true, for the very reasons, I think, that you stated. That if——

Senator HEFLIN. Well, they are really what you stated. I was quoting you.

Justice REHNQUIST. Well, OK, what I stated, Senator. If the President appoints a Cabinet member, the President has a great deal of authority over the Cabinet member. If the Cabinet member does not do what the President likes, the President can fire the Cabinet member.

But the authority of the Chief Justice over the Associates is just very, very minimal, and you get no kudos from the people who are watching your performance—the law reviews, the bar associations, and that sort of thing—for voting with the Chief Justice.

There is just nothing ever said about, you know, let's get one for the Chief.

Senator HEFLIN. Do one for the Gipper. For old Burger, do one.

Justice REHNQUIST. The Chief does not correspond to the Gipper, at least in the eyes of Associate Justices, except in those rare situations like Brown, or the Nixon tapes case. And there I think there is a little of that.

But generally, each Justice wants to be regarded as totally independent, and you are praised in law reviews, if you are regarded as quite independent of everybody else, and if people vote together.

You know, there is the Minnesota twins, or something like that, or the Arizona twins, or something like that. It is regarded as something of a stigma to vote regularly with someone else. My own opinion is it should not be, but nonetheless, the fact that it is perceived that way produces those sort of pressures. Not to join up with any alliance, not to be regarded as carrying water for the Chief Justice, or any other Justice, but just being totally your own person.

Senator HEFLIN. Now there is the other role of the Chief Justice, his function as a leader of all of the judicial systems in the United States. As a leader of the State judicial systems, that is more as a symbol. But nevertheless, I think Chief Justice Burger has been of great encouragement to the State judicial systems to improve.

He also has been instrumental in calling for the creation of certain organizations and bodies. One is the National Center for State Courts, which he advocated, I believe in a speech at Williamsburg in 1971 when the president was at Williamsburg at a first conference of the judiciary.

Chief Justice Burger also was instrumental in calling for the creation of an institute of court management, which has trained court executives, whom now you have in the Federal judicial system, certainly at the circuit level—Court administrators.

He was instrumental in what Congress finally passed as the State Justice Institute, which is to be of some assistance to State courts. There is the work that the Chief Justice has done by encouraging judicial education among all judges and all supportive personnel in the State justice systems, particularly the National College on the Judiciary and the American Academy of Judicial Education. He has encouraged and spent a lot of time on some of these organizations, visited various State courts, and also developed or encouraged State organizations like the National Conference of

Chief Justices, the National Conference of State Court Administrators, and others like it. So he has had an impact on the State judicial systems, and has been, in my judgment, very beneficial to them; and they have, as a result, been very helpful.

While this is not a statutory duty, it is rather, an extraordinary effort on his part, to try to improve the system of justice. To me this is an area that, I hope, if you are confirmed, or whoever is the new Chief Justice of the United States, will endeavor to carry on, and to do those things because they are extremely important in my judgment.

Justice REHNQUIST. I unreservedly agree with you, Senator. I do not think the State courts or State court judges have ever had a better friend in the Office of Chief Justice than the present incumbent. I like to think that while perhaps not having all the innovative capacities that the present Chief Justice has, I am not sure that there is need for those with all the institutions that he founded. If I am confirmed I will at least follow in his footsteps, and see to it that those institutions work.

Senator HEFLIN. In addition to being the Chief Justice of the Supreme Court, and the internal workings of that Court—and I do not endeavor to minimize that—but I think, in directing this, you are being nominated for Chief Justice, regardless. Whether you are confirmed or not, you will still be on the Court. So I think that there is some distinction, and I hope we have brought that distinction out and focused on that issue.

You, of course, will also be the head of the Judicial Conference of the United States, which is in effect a body that has certain rulemaking power, certain powers of recommendation pertaining to legislation, and reviewing legislation that affects the courts.

The Chief Justice appoints the chairmen, members of the committees, including the administration of criminal law, court administration, operation of the jury system, rules of practice and procedure. The Chief Justice oversees the administration of the bankruptcy system, judicial ethics, administration of the magistrates system, and others.

In addition to this, the Chief Justice also chairs the Federal Judicial Center which is largely the research, training and educational arm of the Federal court system. The administrative office works under the direction of the Judicial Conference. Then there is the role as the building manager of the Supreme Court building.

Now what is your intention relative to these types of endeavors? Are you interested in trying to work in these capacities, with an idea of improving the Federal system of justice, and the various duties that are called for by those specific functions and specific responsibilities?

Justice REHNQUIST. Senator, I am interested in working in those areas but I do not think perhaps all of them equally. I certainly would have to find out a great deal more about it.

The Miller Center, I know that you know this, Senator, at the University of Virginia, did a very substantial study on the Office of Chief Justice, and there are something like—I forget—50 or 60 statutory responsibilities that the Chief Justice has, which the Associate Justices do not have.

So I certainly do not know these by experience at all. I think one of the suggestions that was made by a number of the people who participated in this program at the Miller Center, was that the Chief Justice ought to give serious consideration to delegating some of these responsibilities and perhaps ask Congress to authorize delegation in some situations. Now I know that you introduced a bill a few years ago to provide for a chancellor, who would perhaps correspond partially to a 10th Justice or a Justice for administration, and I believe the provision was that that person would be a delegate of the Chief Justice to preside over the Judicial Conference. Certainly, I think that is an idea well worth exploring.

I have a feeling that the consensus of these people in the Miller study seems to be so heavily on the side that there should be some delegation, that the Chief should not keep it all in his own hands. But I would give the most serious consideration to that, hoping that it would enable me to devote time, selectively, to the things that it seemed to me that I could not delegate.

Senator HEFLIN. I believe Chief Justice Burger has advocated a 10th Justice of the Supreme Court, which you would call an Administrative Justice, which we called in the bill that we had, the chancellor. That chancellor would have been a permanent member of a group, sort of like in a circuit tribunal, as a permanent judge.

But now, this raises another question, which is a question that concerns me, and I think it should concern all members of the judiciary and Congress, which is the relationship of Congress and a Chief Justice, on the improvements in the machinery of justice. There is a certain feeling on the Court and feelings by Chief Justices that Chief Justices do not lobby, and there is a feeling up here that Chief Justices or Justices should not lobby for legislation. But there is a void as to how the needs of the courts and the opinions of those that are mostly concerned with it, how they are made known to Congress, and how Congress should respond to them.

And in some court systems in the States, they have had a legislative liaison, in effect, that represents the court or represents the Chief Justice in making known and following legislation. Of course, the Chief Justice has an administrative assistant, but there is still a great reluctance in this field because of the separation of powers. It is an area that is not clearly defined; it is an area that is blurred. To me it is an area that needs some clarification, because certainly, we do not want the Court or the members of the Court or the Chief Justice to do anything that would interfere with their independence; and at the same time, there is probably some feeling that there ought not be lobbying over here in that sense, or to demean themselves in that manner. But still, at the same time, there is that area of how do you get things done for a judicial system? To me, I think that in my observation here, that there is a terrible void in this, and there needs to be some leadership and trying to improve the machinery of justice through congressional activity.

We have had the Williamsburg Conferences and that sort of thing. It may have been fairly well-attended for a while, and then I do not believe we had one this year. But, if you become Chief Justice, would you be prone to be willing to sit down with the chairman of the committee here and attempt to work out some type of machinery by which the overall court system and its needs would be given attention as to how we might try to take care of the needs of the Court?

Justice REHNQUIST. I would regard it as a high priority, Senator. It seems to me there is a great deal of mutual interdependence, whatever you want to call it, between the Congress and the Federal courts. And that does not mean that one should obviously be lobbying the other for things that are not properly lobbied for, or that there be lobbying in reverse.

But just the concept of judicial machinery that I think you told me was covered at the Williamsburg Conference—I think Senator Specter also said something like that—I do not think Congress with all of its other responsibilities and the Judiciary Committees of the two Houses, with all of their other responsibilities, are going to necessarily know in detail the problems of the Federal courts, or at least the problems that the judges of the Federal courts see to be those things, unless someone from the Federal courts comes and tells them about them. I would think the logical person to do that would be either the Chief Justice or some recognized delegate of the Chief Justice that the Judiciary Committees had confidence in.

Senator HEFLIN. Well, I know right now we have this question of the issue, and you have been asked previously about this Inter-Circuit Tribunal, and of course, it has been around now for a long time on the national court of appeals, starting with the Fraun Commission back in 1973, and then the Hruska Commission in 1973–75, I believe, making its reports, and the problems. You have outlined it pretty clearly with your analogy of the 150 cases over the history of the Supreme Court that we have, and that that is about the limit, but that we do it.

Now, do you have any particular preference that you would like to express on what you might like to see concerning the organization of some type of relief structure for the Supreme Court, pertaining to conflicts and its heavy load?

Justice REHNQUIST. Senator, I think it was Arthur Vanderbilt that said, "Judicial reform is no sport for the short-winded." And I think the Inter-Circuit Tribunal is proving to be that. Since the idea was first advanced more than 10 years ago, many respected students of the subject still have substantial reservations about it. And I have no doubt at all that if Congress would prefer to see a temporary Inter-Circuit Tribunal put in that that is the way it ought to go, rather than have no reform.

But ultimately, and I think if Congress could be persuaded, not ultimately but very presently, there ought to be a new national court, frankly recognized as such, with judges appointed by the President and confirmed by the Senate, who would act as something of a junior chamber of the Supreme Court, to hear primarily statutory cases about which there are presently conflicts in the circuit.

It seems to me that this new junior court, or national court of appeals, poses no threat at all to the Supreme Court, because the kind of cases that I envision the Supreme Court referring to them are not the controversial, highly-charged constitutional issues upon which the Supreme Court has staked out positions, but statutory cases where I think most of us would trust five or seven competent judges to reach the same result as any other five or seven competent judges, with some differences, naturally. But it would not be doing the kind of, what I think of as the five-to-four work, five votes to four, that our Court often comes up with.

I think the sooner that kind of a tribunal is in place, the better off the country will be.

The CHAIRMAN. The distinguished Senator from Wyoming.

Senator SIMPSON. Mr. Chairman, I thank you, and let me yield to my patient colleague from Kentucky who has been here and would do something bad if I did not yield to him. [Laughter.]

The CHAIRMAN. The distinguished Senator from Kentucky.

Senator MCCONNELL. Nothing other than faint. Never have I been sorry to see the Senator from Wyoming show up.

Mr. Justice Rehnquist, harking back for a moment to the line of questioning by Senator Leahy with regard to *Laird* v. *Tatum,* during your 1971 confirmation hearings, were you questioned about prejudgment of issues as grounds for recusal?

Justice REHNQUIST. Senator, I have been over the testimony of those hearings, and I am honestly trying to think whether I was or not. I think I was. I am not positive.

Senator MCCONNELL. Were you questioned during your confirmation hearings about your testimony before Senator Ervin's Subcommittee on Constitutional rights, testimony which touched on the issues later involved in *Laird* v. *Tatum*?

Justice REHNQUIST. I think I may have been, but I am not positive.

Senator MCCONNELL. Didn't you address your comments in *Laird* v. *Tatum,* in the memorandum in *Laird* v. *Tatum,* to the propriety of judges participating in cases over which they had formed some prejudged opinions on constitutional issues?

Justice REHNQUIST. Previously stated positions, I think, yes.

Senator MCCONNELL. Didn't you state in that memorandum that it would be extraordinary if Justices came to the Supreme Court without at least, quote, "Some tentative information that would influence them in their perception of the sweeping clauses of the Constitution and their interreaction of one another"?

Justice REHNQUIST. Yes, I did.

Senator MCCONNELL. Didn't you also say that, quote, "Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of Constitutional adjudication, would be evidence of lack of qualification not lack of bias"?

Justice REHNQUIST. Yes, I did.

Senator MCCONNELL. As I read it, yesterday's New York Times article that suggested you had not even mentioned your prior testimony on recusal and your participation memo in *Laird* v. *Tatum* is incorrect. It is my understanding that you did generally refer to prior congressional testimony in your memorandum as one source of prior experience that does not require recusal. Is that correct?

Justice REHNQUIST. I believe it is, Senator.

Senator MCCONNELL. Moving on to another subject, Mr. Justice Rehnquist, in a 1974 ABA Journal article entitled, "Whither the Courts," you called attention to an explosion in constitutional litigation. Mentioning several possible solutions, none of which you found acceptable, you concluded that, and I quote you, "Frankly, I do not know what the solution is, but I have enough evidence, enough confidence in the genius of our country's institutions to think that it will be found."

It seems to me that 12 years later, this litigation explosion has ventured well beyond constitutional law and has permeated virtually every facet of the law.

I am curious to know what, 12 years later, you believe to be the role of the judiciary in general and the Supreme Court in particular in grappling with the runaway litigiousness of our society.

Justice **Rehnquist**. The judiciary is kind of fettered by many restraints, many put on it by Congress. Congress has a propensity to create new causes of action every session, and each one of them by themselves may be utterly unobjectionable, perhaps beneficial. But gradually the same thing is happening to the Federal court system as the environmental people saw was happening to Lake Erie 25 years ago. We have a system that has only a finite capacity, and more and more is being expected of it. And it is quite understandable that the system cannot perform quite the way it did in the past and that there are real problems ahead. I think that Congress is going to have to in the near future ask itself, do we repeal diversity jurisdiction. Repeal of diversity of jurisdiction—and I remember looking at some statistics when I went down to Lexington and spoke at the University of Kentucky 3 or 4 years ago; I think the Federal courts in Kentucky have a great deal of diversity jurisdiction, cases based on diversity of citizenship. Now, that would help the district courts a great deal. It would help the district courts in States like Kentucky and the less populous States more than it would help some of the very popular States, where I think there is a smaller percent of diversity jurisdiction. It would help the courts of appeals some, but it would not help them as much as the district courts, because a lot of the diversity cases are strictly demands for money judgment, the kind that can be settled on appeal. Whereas, if you are talking about some more personal claim, a constitutional claim, it is much more difficult to settle that case after you have won a judgment in the district court and are talking about appealing to the court of appeals.

Repeal of diversity jurisdiction would not help the Supreme Court of the United States at all, because we never grant certiorari in diversity cases. So that diversity would help at the trial level of the Federal court system; repealing that would help a great deal. It would not solve our problem, the Supreme Court's problem.

The national court of appeals situation would help the Supreme Court most of all and not give great benefit to the other courts.

What type of help the judges of the courts of appeals feel they need to handle this mounting explosion is something I think they are probably far better to speak up about than I have, and very likely they have spoken.

Senator **McConnell**. Let me ask you, in your opinion, about the frivolous lawsuits problem—you hear a lot about that these days. Under the Rules of Civil Procedure, there are supposed to be some penalties for bringing frivolous lawsuits. Do you think that is a problem, and if it is a problem, are the penalties not adequate, or are they not being enforced? What is your view about that?

Justice REHNQUIST. Senator, I think that a lot of times, Supreme Court Justices are thought to have a far greater grasp of the facts of the professional world and the legal world than they do. It has always seemed to me that the provisions of the Federal Rules of Civil Procedure, the affidavit of bona fides required under rule 11, the provisions for assessment of costs for frivolous motions, that the tools are all there for any district judge who wishes to use them to dispose of frivolous lawsuits the way they are supposed to be disposed of.

On the other hand, it may be that there are some judges who do not take advantage of these rules. I cannot think of anything now that comes to mind from what I know as a Justice of the Supreme Court, which does not cover the whole waterfront by any means, that would lead me to think significant changes are necessary to solve the problem of frivolous lawsuits.

Senator MCCONNELL. A frivolous lawsuit does not make it to your level——

Justice REHNQUIST. Well, do not kid yourself, if I might use that rather familiar term to a U.S. Senator. Because of the in forma pauperis rules, litigants in our Court can file petitions for certiorari without paying costs, and they can file petitions for rehearing when their petitions for certiorari are denied. And a substantial part, not a major fraction, perhaps not a large minor fraction, but a significant minor fraction of the petitions for certiorari we get in our court each year are people who just are outside—to talk about outside the mainstream, they are really outside the mainstream of litigation. They have started a lawsuit in a trial court somewhere, they have lost it, so they bring another suit, and they now name the judge who ruled against them as a defendant. And then they appeal the decision against them to the court of appeals; the court of appeals says no, there is nothing to it. They petition for certiorari; we deny it. They petition for rehearing. And then they start all over again, adding everyone who has decided against them along the way as defendants.

Now, this is not a major problem. The courts know how to handle this thing. But I did want to correct the impression perhaps that lots of people share with you, Senator, that frivolous lawsuits do not make it to our Court. They are not granted, but there are efforts made.

Senator MCCONNELL. In your view, then, could or should judges do more to enforce or impose the penalties that are currently available for the bringing of frivolous lawsuits?

Justice REHNQUIST. I have a feeling that that might be desirable, Senator, but again I do not know. I would want to know more about what is going on in the various district courts, the various courts of appeals before I simply leap to kind of a facile conclusion yet.

Senator MCCONNELL. Is that the sort of thing that you feel might be appropriately addressed if you become Chief Justice?

Justice REHNQUIST. I think that is something that might be very appropriately addressed by a committee of the Judicial Conference which would represent people from different circuits, different parts of the country, perhaps district court and courts of appeals judges, who would have more hands-on feeling for how this thing is working than, frankly, I would.

Senator McCONNELL. You mentioned the transaction cost a while ago; the cost of litigation is obviously enormous these days. And you mentioned an example of a type of case that a firm of some reasonable size might not even accept because the fee could be greater than the amount of money involved.

I have not given a whole lot of thought to this, but in regard to the whole area of alternative dispute resolution. I am wondering if you think that it provides some opportunity for relief in the future to further promote alternative dispute resolution as another way of settling disputes.

Justice REHNQUIST. I think it does, Senator. I was up at an Allegheny County, PA Bench Bar Conference early in June and talked to several lawyers and a couple judges up there. And it sounds to me that in Pennsylvania they really have a system working that requires arbitration before you go to court, given certain jurisdictional limits and certain other facts. I am obviously not familiar with the details. But my impression, talking to people up there, it is a success, it is well-regarded by lawyers and laymen alike, and the limits have been steadily raised so that now the limit is much higher before you can go directly into court without going through court-attached arbitration.

Senator McCONNELL. Some of the lawyers at home tell me that one of the problems they have experienced with ADR is that the party who is disappointed in the outcome is inclined to go back and start the process all over again. I am guessing you will not answer this, but I am wondering, and I will ask it anyway, if you see any constitutional problems with the following kind of approach: (a) that the lawyers for all the parties would have to certify to the court within a certain period of time that they had apprised their clients of the various alternative dispute resolution techniques available, and (b) if the parties signed off on that and agreed to an alternative dispute resolution approach that the option to go back would then be waived; that if all the parties agreed to ADR as a way to settle a dispute, they would thereby waive their option to go back through the court system.

Would you see some constitutional problem with that?

Justice REHNQUIST. So there would be no hearing in any court?

Senator McCONNELL. They all waived it; they all signed off on an agreed alternative dispute approach; they would in effect waive their right to go back through the court system.

Justice REHNQUIST. Well, that is not Marbury against Madison, when I was talking to Senator Specter a while ago. To me, that is not so clear that I feel free to answer it.

Senator McCONNELL. I thought you might not want to do that.

Let me ask just one other general question, Mr. Chairman, and I will be through.

We talked about caseload in general. Is there anything else that you can think of beyond the points that you have made that you could do as Chief Justice to help lessen the Federal caseload beyond the suggestions that you have made?

Justice REHNQUIST. I think the present Chief Justice's proposal of some sort of an impact statement requirement for committees of

Congress which propose bills which create Federal causes of action might be useful if Congress thought it were useful. That is, if you are going to have a new cause of action created, or a new right to sue in Federal court, let us try to figure out how many cases are expected to be brought, and might they be concentrated in one part of the country rather than the other; is this going to take new judges.

Certainly, it is always Congress prerogative to create those. But what so often happens is that the causes of action are created, and then the new judges are not forthcoming.

Senator McConnell. Thank you very much.

No further questions, Mr. Chairman.

The Chairman. The distinguished Senator from Illinois.

Senator Simon. I thank you, Mr. Chairman.

Mr. Justice, there should be no question about your endurance after today, if nothing else. I noticed when we arrived this morning, there were long lines in the hallway to get in here. The lines have disappeared; the audience has virtually disappeared. But we are still here.

You have discussed your ideas on the position of Chief Justice. Let me just ask one other question in that connection. Chief Justice Burger has, in the area of funeral reform for example, spoken out in a very healthy way and made a real contribution to the Nation. Is there any area like that that you have thought about in which might contribute something special to the Nation?

Justice Rehnquist. Senator, I would certainly want to give some thought before coming up with a conclusive answer. But I think the business of alternative dispute resolution that I have mentioned to several of your colleagues is probably as important a concern to me as penal reform is to the Chief.

Senator Simon. Well, I would welcome a contribution in that area.

Then, let me discuss some of my concerns. There is no question in my mind about your ability, no question about your integrity. I guess I do have questions about your sensitivity in the area of civil liberties and your ability to function as the kind of symbol for everyone which I think a Chief Justice must be.

Let me go back—this is a White House tape. John Ehrlichman is talking to President Nixon July 24, 1971. The President complains: "Nobody follows up on a 'blank-blank' thing. Do you remember the meeting we had when I told that group of clowns we had around here, Wrenchburg and that group—what's his name?"

Ehrlichman responds: "Rehnquist."

Anyway, you at that point had headed this classification group, and I believe one of the people who was working for you was David Young. Is that correct?

Justice Rehnquist. Senator, I knew David Young. But I am not sure I was head of any classification group. I was part of a project in the Office of Legal Counsel to recommend revision in the classification regulations. It might be that David Young worked with me; if he did, I do not remember it.

Senator Simon. That is the group I am referring to. The document I have indicates you were named chairman of that group.

Justice Rehnquist. Yes, then that is it.

Senator SIMON. And David Young, and you may or may not—Egil Krogue, do you recall him working?

Justice REHNQUIST. Oh, certainly, yes.

Senator SIMON. And Mr. Hunt—I forget his first name already—Howard Hunt?

Justice REHNQUIST. Was he on that?

Senator SIMON. He apparently worked for the committee, according to the document I have, yes, for that group.

Justice REHNQUIST. I certainly do not recall it. If that is what it says, maybe that is the way it was.

Senator SIMON. And Gordon Liddy?

Justice REHNQUIST. He worked for the group, too?

Senator SIMON. That is correct.

Justice REHNQUIST. And I was chairman of it? [Laughter.]

Senator SIMON. Yes. And I do not know that they worked full-time or anything like that, but they were doing some work for it, according to the documents we have now. But that leads to a question—and I am just probing here on September 4, 1971, Ellsberg's office was burglarized. Since they were at least working part-time on a project that you were involved in, did you have any knowledge of this, were you in any way involved in it?

Justice REHNQUIST. No, I was not.

Senator SIMON. And you had no knowledge of that in advance at all?

Justice REHNQUIST. No.

Senator SIMON. In probing this whole area of sensitivity on civil liberties, we dig out things that people write and say. We could pull out some things that any of us have said that we would probably not be exactly proud of. But at one point, you wrote a memo to Justice Jackson, referring to "some outlandish group like Jehovah's Witnesses," and there was the decision, the Jehovah's Witnesses decision, in regard to Indiana, the Buddhist Prison decision.

Now, I recognize that neither Buddhists nor Jehovah's Witnesses are particularly popular groups in our country, but I think it is important that we defend the liberties of the most isolated, unpopular groups.

Justice REHNQUIST. I agree with you.

Senator SIMON. I know you declined to answer any questions from Senator Grassley on the Establishment Clause, but do you have any reflections on the important role that you have to take as a Justice of the Court in defending the most unpopular causes? And incidentally, I differ with some of my colleagues, as I indicated yesterday; I think your willingness to be "the lone dissenter" is, a plus rather than a minus. But do you have any reflections on that without getting into areas that I should not be getting into or where you feel uncomfortable or would be improper.

Justice REHNQUIST. No, I have no reluctance at all to defend either the Establishment Clause or the Freedom of Religion Clause.

Now, I have in my opinions read the Establishment Clause more narrowly than some of my colleagues. For instance, last year in the Wallace against Jaffrey case which, as I recall came out 5 to 4, as to whether the Establishment Clause prevented the moment of silence in Alabama, and I think a majority of our Court held it did, for different reasons, and I and several others felt it did not. Now, obviously, the four of us in dissent took a somewhat narrower view of the Establishment Clause than the five who said it prevented the moment of silence that Alabama had enacted. And I suppose in that sense you could say the person who is in dissent there is not as sensitive to the Establishment Clause as the person who voted to expand it.

But I also think, Senator Simon, that these are almost questions of degree and that there is not a tremendous amount of difference there as to the broad principles of the establishment clause are uncontroverted, and those kinds of cases do not get up to us because they are pretty well settled. It is these kinds of frontier-type cases that come up and reflect divisions among us--and I certainly have read the establishment clause more narrowly than some of my colleagues.

Senator SIMON. I think you are correct in saying these are questions of degree. There are some of us—I include myself among them—who think we have to be very, very careful as we look to history, not only our own history, but the history of other nations, so we maintain that freedom of religion and do not get Government involved unnecessarily.

Let me turn to another aspect of this. I questioned the two representatives of the Bar Association on this subject. As I look at your record—and I have read all 47 dissents as well as a few of the other opinions you have written, and incidentally, I am a journalist by background, and I appreciate someone on the Court who writes using the English language and who writes clearly—but as I look at your decisions and at the background, including the Phoenix, not what happened at the precinct, but the letter to the editor of the Phoenix newspaper, and the decisions through the years, I guess I do not see someone who is a champion of justice for all citizens, for the minority, for women, for people who need a champion and who may not have one.

Am I misreading that record?

Justice REHNQUIST. I would say partly but not entirely. I mean, I do not think any person who studied my record would have any question as to my fairness or lack of bias toward any litigant or any cause appearing before me. But I think that certainly, groups who are going to have litigation insofar as a broad reading of the equal protection clause are going to see in me not a champion, but someone who more frequently votes against them than someone who would read the equal protection clause more broadly than I would. And in a sense, therefore, you have a spectrum where the person who appears as the champion, perhaps a real champion to women's groups or to minorities, is going to appear as a good deal less of a champion to the citizens of a community who vote and pass a legislative act which is held to be limited by the equal protection clause, because I think, Senator, there are two sides—in fact, it is almost trite to say it—in almost every one of these cases where the equal protection clause, which I think is the main clause, is claimed under and often decided in favor of the people whom you refer to. Every time the equal protection clause is invoked, it means that an act of some State legislature, or an act of Congress, is struck down.

Now, certainly, it was intended that the Bill of Rights and the other restrictions on Congress and State legislatures be applied in just that way. But occasionally one gets the sense that it is a victory for the Constitution every time a court invokes a constitutional provision to strike down a law. I do not subscribe to that, and I do not think most people who approach it from that direction would think so, either, because you know, every bit as much as the Bill of Rights are protecting the rights of the individual in this country, we certainly also believe in representative democracy where a majority can make rules that bind the rest of them unless they do conflict with some provision in the Bill of Rights.

All I am saying is that more often than one might think sometimes, there are really factors to be weighed on both sides.

Senator SIMON. Using the office of Chief Justice as a symbol, which you really are in addition to fulfilling a very important function in our society—in the same way the Statue of Liberty is a symbol—do you think you can be an effective symbol of justice for all?

Justice REHNQUIST. Yes, I think I can, Senator. And if I thought in order to do that that I would have to change the philosophy, or the judicial philosophy evidenced in 15 years of decided cases, I do not think that would be a proper thing for me to do, except perhaps where there are constraints that there ought to be a court opinion rather than a plurality opinion. Those are not the principal things I am sure you are asking about.

But I think the Chief Justice as symbol has so many nonadjudicative functions—you know, whom he speaks to, whom he works with and that sort of thing—there, believe me, my door would be open as wide as anyone else's door in that office.

Senator SIMON. One of the other charges that is made about you, Justice Rehnquist is, as I read the literature—and that can distort the view of any of us; I read about myself once in a while and I do not recognize myself—but one of the charges is that you are not open-minded, that you in a sense have made your mind up, and have fit the facts to that rigid ideology and to that preconceived notion. How would you respond to that?

Justice REHNQUIST. I would respond to that by rejecting it quite emphatically. You know, that is not to say that I do not have ideas, which I certainly have followed; I have a sense of what I think the Constitution means. But it certainly is not a sense that is, fixed in concrete at all. I am one of the few members of our Court who can present both exhibit A and exhibit B in support of open-mindedness. On two separate instances since I have been on the Court, I have written opinions for the Court overruling earlier opinions that I have written, which certainly is some testimony to openmindedness.

Senator SIMON. One——

Senator BIDEN. Excuse me. What were those opinions? I am just curious, if the Senator would not mind—not to explain them, but just name them.

Justice REHNQUIST. *United States* v. *Scott,* overruled Jenkins; and either Davidson or Daniels this past term, overruled a significant portion of *Parratt* against *Taylor.*

Senator BIDEN. Thank you.

Senator SIMON. One other question. I do not want to get into any past health problems or anything like that. But Justice Powell has been very open about his difficulties. We had a situation that was not a good situation during the final months of Justice Douglas' tenure, before he died. What about the Chief Justice in the future if, 3 years from now, 5 years from now, health problems arise? Do you intend to deal openly with the public on that kind of matter? Have you thought about that?

Justice REHNQUIST. Well, I have thought about it, frankly, since I called on you and you mentioned it to me. And I think there is a tendency—I think judges have much more of a tendency to—I cannot think of the expression—something about "pulling the wagons around" or something like that—than people in public elective life, the way Senators are. Just because—particularly on our Court, where there are only nine seats, the health of every individual Justice is an endless subject of speculation. You know, is he sick, or really sick? And I went through that when I was in the Justice Department in 1971, when Justice Harlan was ill in the hospital, and Justice Black was ill in the hospital. Some of the calls I got from people I knew in the press were almost goulish. And perhaps that is it partly, that I have brought with me a sense that so long as I can perform my duties, I do not think I have any obligation to give the press a health briefing.

But I also see the point you made when you and I talked, and particularly in the office of Chief Justice, I think I would have to approach it differently.

Senator SIMON. Thank you, Mr. Justice. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

The distinguished Senator from Wyoming.

Senator SIMPSON. I look at my colleague Senator Broyhill. Have you had your day yet in the one round?

Senator BROYHILL. No.

Senator SIMPSON. You were here before I was, but let me then just shorten; I just have a very few remarks and questions, and then I will yield to Senator Broyhill.

Thank you, Mr. Chairman. I have been informed of the proceedings and have been watching some, and I am very interested in the questions and your responses. It has been very important that you have addressed each and every issue that has been presented, and I think you have responded fairly in the circumstances.

I would come back to a thing I dabbled in a little yesterday, and that is the issue of ballot security issues. I think that I would really be intrigued as to how many young lawyers who decide to go into politics, or become involved with a party, do not find that one of the first things you seem to get into is, first of all, to be a precinct committee man or woman, which is a ghastly experience in many ways. And then to go canvassing, which is another remarkable process which you really did not believe you had to do when you got to be the precinct committee man or woman.

But then when the county chairman would tell you to go to this precinct where they vote all these Republicans all the time—or where they vote all these Democrats all the time—and check it out, that was always an interesting ritual

In my county, rather loaded with those of the Republican bent, they used to have ballot security checks. The Democrats would do that to see that all was appropriately done, and then the Republicans would do that, too.

It was called ballot security, and each State has its own differing laws on that, and I know, at least in my State of Wyoming, each party selects a person. They actually can go to the polling place to challenge or to review the voting to be certain that it is carried out appropriately. In those former days, you could also present whatever the law of that State was before those who were preparing to vote.

So I just come back to that briefly about your activities concerning the polling places in 1968. We went through that before in the hearings of 1971, where you responded that you were not engaged in any sort of poll-watching, and that accusation involving 1968 was dropped.

Other allegations were made regarding the alleged personal challenging of voters in 1962, and those were found to be "wholly unsubstantiated and totally unfounded." The same was true in 1964; a charge was made and disproven.

In rereading the committee report, I see that other unrelated charges were also raised and then disproven and dropped. And so it is interesting to me to see those comments, that alleged misconduct, accusations, come up today, 25 years later, inconsistently.

I fully realize we are talking of that time ago, and you have given us your best recollection. Anyway, you testified in 1971 that you believed that, in your capacity as chairman of the Republican Lawyers Committee, that you visited these certain polling places in 1960 and 1962, and that is a correct statement, is it not?

Justice REHNQUIST. If that is a quote from my testimony, it certainly is.

Senator SIMPSON. In 1971 you testified that in 1960 and 1962 you went to those precincts where disputes had arisen, it being part of your duty as chairman to attempt to negotiate for your side in resolving such disputes.

Justice REHNQUIST. Again, yes; if that is what the statement says, that is correct.

Senator SIMPSON. And in other testimony, you stated in 1962 you witnessed a Republican challenger engaging in what you considered to be harassment and intimidation, and that you advised that challenger to cease and desist.

Justice REHNQUIST. Yes.

Senator SIMPSON. Do you recall that?

Justice REHNQUIST. I do not recall it now, but I recalled it in 1971, I think.

Senator SIMPSON. But that at no time did you yourself engage in the harassment or intimidating activity?

Justice REHNQUIST. That is correct.

Senator SIMPSON. I just wanted to review that again. That seems to come back like an old saw—and it does seem old to me. But to comply with my statement so I can yield to the fine Senator from North Carolina let me recognize the presence of Senator Heflin.

I have come to have great respect and admiration for him in his work as a lawyer, and chief justice. He was chief justice of the Alabama Supreme Court, and he has some very fine approaches toward modernizing the courts' review systems.

He is most serious about that, and I have heard him ask some questions about that. Would it be your intent as Chief Justice to be accessible—and I think you already addressed this—to the Judiciary Committee, to the young lawyers, to the law schools, to the students?

That is not to say that Chief Justice Burger has not, but would that be your intent to let people know that this is not the Chief Justice sequestered; but that this is the Chief Justice, the human being, the person you can visit with, to have seminars with? As I say, Justice Burger has done that. What would be your intent about that?

Justice REHNQUIST. Senator, if I am confirmed, I think I perhaps ought to sequester myself for a short period of time until I understand the job better, and then I certainly propose to behave just as you suggest.

Senator SIMPSON. You have traveled a great deal and made yourself accessible as Associate Justice, have you not?

Justice REHNQUIST. Yes, I have. I think I have visited, you know, a great number of law schools. As you well know, I visited the University of Wyoming Law School in Laramie last year.

Senator SIMPSON. And you would intend to continue that communication with the bar and the young lawyers and with students?

Justice REHNQUIST. Yes. I have the feeling—I enjoy that, and I certainly hope to, if it is possible. But I have the feeling from some of the concerns expressed by the Senators and some of my own feeling that there is probably work to be done in the sense of the Brookings-type meetings at Williamsburg and some of the other duties that the Chief Justice has that are not going to enable me to enjoy that sort of thing as frequently as I did when I was an Associate Justice.

Senator SIMPSON. Well, I was one, along with Senator Heflin, who attended those quite regularly. They were good, and we had a fine relationship with the Supreme Court Justices, the Judiciary Committee of the House, the Judiciary Committee of the Senate. I like those; I wish I could get to more of them, and will hope to do so in the future.

But I just wanted to briefly inquire on those issues, then when you get to the issue of how you are as a Justice—what is your position as a dissenter or a nondissenter—I guess there are as many Court watchers as there are Congress watchers.

Rating systems—I am always fascinated by those; dissent dissectors. And we all get rated, scored. I understand that there is not any area that we do not get examined on, and then they have the scorecard and the flunk test, and we get that.

Obviously, you have groups watching the U.S. Supreme Court doing that, and I am always fascinated by that. So we will not try to peg you as to where you are.

Senator Simon has read more opinions of the Supreme Court now than I did when I practiced law. [Laughter.]

He said he read all 49 dissents

Anyway, I would hope you would continue as your predecessor, Chief Justice Burger, in being accessible to the bar and telling them things they really do not want to hear, sometimes. For example, about responsibility and greed and where the profession is going if it just is dedicated to how much money you can scratch together in the course of practicing law, without ever doing the pro bono and the other things that make me proud as a lawyer.

I hope you will be doing that as Chief Justice, and I hunch you will from what I know of you and about you.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

The distinguished Senator from North Carolina.

Senator BROYHILL. Thank you very much, Mr. Chairman, and I know the hour is late and I appreciate your patience and your stamina as you have stayed here all day and have answered articulately all of these questions.

I am, of course, the last of the questioners as a result of the fact that I am a new member of this committee and a new member of this body, only having joined this body 2½ weeks ago.

Both of my predecessors, however, who occupied the seat that I now occupy in the Senate were both members of this committee, Senator John East and Senator Sam Ervin. Thus, it is a high honor for me and a privilege, a nonlawyer, to occupy this seat on this committee at this time in history.

I do not pretend to be a constitutional scholar. I am not going to really ask you a lot of fine points of constitutional law. But I know one thing I have learned around here in my 23½ years' experience in the Congress of the United States. Every day the Congress is faced with deciding issues that at one time in our history were decided at the State or the local level.

They were decided by school boards; they were decided by city councils, county commissions, or State legislatures. And it is also sad to say that we often find that these local and State officials are here urging us to assume an even greater role.

I am not asking you to talk about that, but as a member of the Supreme Court, of course, you do deliberate from time to time on this issue of division of powers in our system of government, and you have a reputation as one who is a champion of the right of local government to govern themselves.

I wonder if you would, for a moment or two, at least, give us your general views as to the proper division of powers in our Federal system.

Justice REHNQUIST. I will certainly try, Senator. I think I said some time earlier today that since the Supreme Court has so expansively construed Congress' power under the commerce clause, that how power actually is divided between the States and Congress is now very much a matter for Congress to decide and no longer that much of a constitutional question.

And as to how Congress exercises that power, certainly that is not a judicial question in the ordinary sense. But my personal preference has always been for the feeling that if it can be done at the local level, do it there. If it cannot be done at the local level, try it at the State level, and if it cannot be done at the State level, then you go to the national level.

And I suppose much of the difference in how many Federal laws, how many State laws we have depends on how people think how well the local and State governments are doing. But I certainly share the concerns you expressed, and I think that the decisions our Court has handed down in the area are an effort to fairly divine the intent of Congress to whether a Federal law shall prevail or where a State should prevail when the two conflict.

And that, really, I think is about the extent of the function of our Court in that area.

Senator **BROYHILL**. One other area. You know, there is a great deal of criticism I hear from time to time about what I think is called judicial activism. Of course, our Constitution is celebrating the 200th anniversary of the writing of that document, and it is a remarkable document.

I think that those who wrote it intended it to be a framework where men and women could govern themselves and not necessarily have someone at a central place governing them. The criticism, of course, is that the Federal judiciary is making law; that is, not interpreting, but, through their decisions, actually making laws.

I wonder if you would elaborate for the committee your views on the proper role of the judiciary in our democracy.

Justice **REHNQUIST**. Well, certainly, it is a fundamental principle that it is the legislative bodies that make the law and the courts that interpret the law. But when you get to some of the broad phrases of the Constitution, you know, what does due process of law mean; what does equal protection of the law mean.

When the constitutions are drawn in those phrases, you are drawing them in a way that necessarily is going to give the judges some authority to—some latitude to construe them, just because their meaning is not self-evident at all.

And I think the general differentiation in that area between judicial activism is perhaps seeking to cure a social evil by an expansive construction of the Constitution. And I think my record of 15 years on the bench reflects that I do not subscribe to that view.

I think that it is—the meaning of the Constitution is best possibly found from relevant materials that you have got to be guided by, even though it does not lead necessarily to the solving of the social evil.

But in other areas, we have real problems of determining intent because Congress—I will be frank to say that I think Congress does not legislate as carefully now as it did 30 or 35 years ago, perhaps, when I was a law clerk, when I was in law school.

Perhaps it is because the bills are 200 pages long, and that sort of thing. And frequently we get cases where I must say that it looks like the proponents of the bill have been given the right to draft section 1 and the opponents of the bill have been given the right to draft section 2, so that the result is you read one section of the statute and it seems to mean one thing; you read another section and it seems to mean another thing.

And there, again, it is not really a matter of judicial activism. It is a question of trying to find out what Congress meant, but often being quite unsure about it.

Senator **BROYHILL**. Well, in a way, it related—Congress over the years has added and given more and more power and authority to various administrators, as well as independent groups that, actually—you know, they are appointed by the President; some are independent; some are subject to their continuing in office by Presidential powers.

But they are given tremendous powers to write rules and regulations that have the force and effect of law; in fact, in some cases have even the effect of overturning State law. And, also, they do have the powers to impose sanctions in many cases; that is, to impose fines, the judicial power.

Now, I have worked for a number of years to try to get some more control over this rulemaking or regulatory power of these independent agencies or the independent rulemaking powers of these administrators.

In fact, a bill was recently passed out of this committee that would, in part, give the Congress the right to look over their end work products.

Now, I wonder if you could articulate your feelings as to how far constitutionally the Congress should be going, or how far they have gone. Perhaps you have articulated opinions on this issue.

Justice REHNQUIST. Senator, I do not think I ought to address a specific question of how Congress could go in regulating this, in view of the separation of powers. I would like to address myself to a point you made in your question and something that I have expressed concern with in an opinion I filed a couple years ago—I think there were only two of us on the opinion—and that is the authority that is given to agencies to preempt State laws, as opposed to Congress.

There is no question, Congress, under the commerce power, can preempt as much State law as it chooses to do so. But I have always felt it was another kettle of fish, if not jurisprudentially, at least practically, for the agency to say, well, now, we are preempting the law, the State law, where perhaps Congress has not specifically given them the authority at all.

I think that is an area we are going to see more of, and in my de la Cuesta dissent, I think I expressed some of the concerns that you are questioning.

Senator BROYHILL. One final expression of concern that I hear—one of the ones that really is more often expressed to me than others—is that the courts, in their zeolous guarding of rights of those who have committed crime, sometimes overlook the right of the victims of crime.

While the rights of criminal defendants are vital to our system of criminal justice, of equal importance, it seems to me, is the right of the law-abiding citizens to have safe streets and safe neighborhoods.

I wonder if you would give us your views on this balancing of rights, as you have viewed them in your past decisions.

Justice REHNQUIST. That is exactly the word I would use, Senator, is balancing. And just as I said to Senator Simon about the equal protection clause in that area, the constitutional rights of the defendants are essential and vital.

But they also stand against the right of society and limit the right of society, in the traditional view of criminal law, to apprehend the guilty and exonerate the innocent.

And, obviously, it was intended that the Bill of Rights have this restrictive function, but I have expressed the view in my opinions that this endless expansion of constitutional rights for defendants by judicial construction is not a welcomed thing because it does tend to impair in a way that the Constitution did not intend to have it impaired, the right of society to fairly and justly administer criminal law, with proper respect not just for the defendant, but for the victim and for the social interest in seeing the law enforced.

Senator **Broyhill**. I thank you very much for your patience, and I thank you very much for your responses to my questions and comments.

The **Chairman**. That now completes round one for all the members of the committee. I want to announce that tomorrow we will meet at 10 in executive session. We have a few matters to take up before we go back to the hearing. We will try to get back to the hearing about 10:15, or as soon after that as we can.

So if you will be here tomorrow at 10:15, Mr. Justice.

Justice **Rehnquist**. Certainly, Mr. Chairman.

The **Chairman**. Senator Hatch may have some statement he wants to make. I see him sitting here.

Senator **Hatch**. No. I would just like to say, Mr. Justice Rehnquist, I think you have done very well today. And it has been very difficult for you and it is a tough process, but we appreciate the patience, forebearance, good humor, and I think the intelligent way you have answered all of our questions.

Justice **Rehnquist**. Thank you, Senator.

Senator **Hatch**. Thank you so much.

The **Chairman**. We now stand in recess until tomorrow at 10 o'clock.

[Whereupon, at 8:10 p.m., the committee was adjourned, to reconvene at 10 a.m., Thursday, July 31, 1986.]

NOMINATION OF JUSTICE WILLIAM HUBBS REHNQUIST

THURSDAY, JULY 31, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee convened, pursuant to adjournment, at 10:20 a.m., in room SD-106, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Mathias, Laxalt, Hatch, Grassley, Specter, McConnell, Broyhill, Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Byrd, and Denton.

Staff present: Duke Short, chief investigator; Frank Klonoski, investigator; Dennis Shedd, chief counsel and staff director; Cindy LeBow, minority chief counsel; Melinda Koutsoumpas, chief clerk, Mark H. Gitenstein, minority chief counsel, and Christopher J. Dunn, minority counsel.

The CHAIRMAN. The committee will come to order.

Is Justice Rehnquist here yet?

Mr. SHORT. He is on the way down now.

The CHAIRMAN. While we are waiting for him, if there is no objection, there are two Congressmen here who want to just take a couple of minutes on this Rehnquist nomination, Senator Stevens and Representative Rudd. If you gentlemen would come forward, we will hear you right now while we are waiting on the Justice to come.

You may proceed, Senator Stevens.

STATEMENT OF HON. TED STEVENS, U.S. SENATOR, STATE OF ALASKA

Senator STEVENS. Thank you, Mr. Chairman and members of the committee.

I had asked to appear the other day, and I had just returned from an overnight flight from Alaska, and I am sure you understand that that was a difficult appearance to make.

The CHAIRMAN. We are glad to have you with us.

Senator STEVENS. I ask that you place my statement in the record in its entirety, if you would.

The CHAIRMAN. Without objection, the statement will be placed in the record.

[The statement follows:]

STATEMENT OF SENATOR TED STEVENS ON BEHALF OF JUSTICE WILLIAM HUBBS REHNQUIST

Mr. Chairman, I consider William Rehnquist a good friend. He and I first came to Washington as young lawyers in the early 1950's. I was greatly impressed by his legal skills and enjoyed our many discussions about the law. I also enjoyed the more light-hearted talks that we shared.

Since those days, our careers have moved in different directions. Unfortunately, this has meant that our paths now rarely cross. I have, however, followed his career with interest. It was a pleasure to participate in the confirmation of his nomination as an Associate Justice of the Supreme Court in 1971. Now, on the occasion of his nomination to be Chief Justice of the United States, I am appearing before you to reaffirm my belief that he is a fine judge, and a great man.

You must decide whether Justice Rehnquist is qualified to serve as Chief Justice of the United States, the head of the Federal judiciary. After reviewing his record as a judge and an individual, there should be no doubt in anyone's mind that he is an appropriate choice to be our Nation's next Chief Justice. In fact, he is a superior choice.

The Chief Justice is responsible for the administration not only of the Supreme Court but also of the entire Federal judicial system. I believe that William Rehnquist's personal demeanor and ability to work well with individuals with whom he does not always agree will enable him to discharge these administrative duties with ease.

The fact that it is a pleasure to know and work with Justice Rehnquist, while important to the administration of the Federal judiciary, is just a part of the question before the committee. Posterity will be interested more in his decisions and his leadership on substantive legal issues than in his record on administrative matters.

Justice Rehnquist's legal philosophy is clear and consistent. During his 15 years on the Court as an Associate Justice, he has written opinions of uniformly high quality, well-known for their sharp legal reasoning. Those opinions are an important contribution to American jurisprudence.

At a time when the Supreme Court often speaks with many voices, the importance of well-reasoned and well-written opinions, even in dissent, goes beyond the merits of the particular case. Those opinions guide the lower courts and shape the future consideration of an issue by the Supreme Court. Justice Rehnquist produces exactly this sort of opinion. I have not always agreed with his conclusions, but Justice Rehnquist leaves no room for doubt of where he stands and what he believes.

It is important to put Justice Rehnquist's overall performance on the Court in perspective. He is not a loner, alienated from the legal mainstream. The man whom Justice Rehnquist would succeed as Chief Justice, Warren Burger, has voted more often with him than any other Justice for 11 of the 15 years Rehnquist has been on the Court.

Justice Rehnquist is also a strong believer in the Federal system. He recognizes that there is no need for the national government to constantly intrude into the governance of the individuals States. That is a principle that some find hard to swallow. I believe, however, that it is a basic principle of our Nation's Constitution.

If Bill Rehnquist succeeds in reinstilling a respect for judicial restraint during his tenure as Chief Justice, his ascension to that office will be counted one of President Reagan's greatest achievements. I look forward to the consideration of his nomination by the full Senate.

Mr. STEVENS, Mr. President, I rise in support of the nomination of Mr. William H. Rehnquist to the U.S. Supreme Court. It is my strong believe that Mr. Rehnquist has the intelligence, integrity, legal experience, understanding of the Constitution, and qualities of fairness and impartially which are so important in a nominee to the High Court. My respect for the Court and its vital role in our system of checks and balances would not permit me to vote for a person who does not possess these qualities.

Mr. Rehnquist's legal scholarship and experience are unassailable. After graduating first in his class from Stanford University Law School, where he was elected to the Order of the Coif and was a member of the board of editors of the Law Review, Mr. Rehnquist served as law clerk to Associate Justice Robert H. Jackson of the U.S. Supreme Court. Those who are familiar with our system of legal education and training know that an appointment to a Supreme Court clerkship is one of the most sought after positions available to a graduating law student. Moreover, Justice Jackson, for whom Mr. Rehnquist served from February 1952 until June 1953, is one of the most respected Justices in the history of the Court. I knew Bill Rehnquist personally during this period as I was a young lawyer here in Washington.

From the completion of his clerkship and until his appointment as Assistant Attorney General, Mr. Rehnquist engaged in private practice in Phoenix, Ariz. His outstanding legal ability and achievements are reflected in positions which he held during this period. Thus, he served as president and a member of the board of directors of the Maricopa County Bar Association in Phoenix, as chairman of the Arizona State Bar Continuing Legal Education Committee, as a member of the National Conference of Commissioners of Uniform State Laws, and on the Council of the Administrative Law Section of the American Bar Association.

During the Senate Judiciary Committee's consideration of the Rehnquist nomination, many strong endorsements of his legal scholarship were received. These expressions of support are well documented in the hearing record and committee report, and I will not dwell upon them now, except to mention two which I believe to be of special significance. First, the Honorable Lawrence E. Walsh, chairman of the American Bar Association's Standing Committee on Federal Judiciary, stated in a letter to the Judiciary Committee that:

> The Committee is unanimous in its view that he is qualified for appointment to the Supreme Court. A majority of nine is of the opinion that he is one of the best qualified available and thus meets high standards of professional competence, judicial temperament, and integrity.

Commenting on Mr. Rehnquist's legal abilities, Dean Phil C. Neal of the University of Chicago Law School wrote:

> Rehnquist was a student of mine at Stanford Law School. He was not only the top student in his class, but one of the best students in the school over a number of years.

I have abstracted certain information which is especially revalatory of Mr. Rehnquist's openmindedness and approach to constitutional issues. With respect to the first matter, I would like to quote again from a letter written to the committee by Dean Neal:

> I am confident he is a fair minded and objective man. Any suggestions of racism or prejudice are completely inconsistent with my recollection of him . . . I believe he would be an independent judge and that he would bring to the Court an unusual capacity for understanding and responding to all dimensions of the difficult problems the Supreme Court must confront. In my judgment, his appointment would add great strength to the Court.

In the same vein, U.S. District Judge Walter Craig, former president of the American Bar Association, testified before the committee as follows:

> I believe this man has a humanity about him and a human warmth that would make him, if anything, more sensitive to the needs of people (and the necessity) of improving their life and their society.

Mr. Rehnquist's regard for individual freedom and the Bill of Rights is best summarized in his own words:

> I think specifically the Bill of Rights was designed to prevent . . . a majority, perhaps an ephemeral majority, from restricting or unduly impinging on the rights of unpopular minorities.

Regarding the procedural protections in the Bill of Rights, he observed last August:

> These procedural guarantees of individual liberty would be regarded by most people as every bit as important to our kind of society as representative institutions are thought to be.

Not only does Mr. Rehnquist recognise the importance of individual rights, he has a keen understanding of the relationship of these rights to society as a whole. In view of the deep concern felt by many Americans that the Supreme Court has lost sight of the proper relationship between individual rights and a free society, I believe that his observations in this area are especially important. Thus, Mr. Rehnquist has stated:

> We all assume that under our philosophy of government, the individual is guaranteed the freedom of sanctity of his person—in short, the "right to be let alone." One aspect of freedom is, of course, freedom from unwarranted official detention or other intrusions on one's physical being. But another aspect of this notion is surely the right to be free from robberies, rapes and other assaults on the person by those not occupying an official position. A government which does not restrain itself from unwarranted official restraints on the persons of its citizens would be a menace to freedom; but a government which does not or cannot take reasonable steps to prevent felonious assaults on the persons of its citizens would be derelict in fulfilling one of the fundamental purposes of which governments are instituted among men. A society as a whole has a right, indeed a duty, to protect all individuals from criminal invasions of the person.

In my opinion, this statement and many others which Mr. Rehnquist has made evidence a responsible approach to the Bill of Rights, which was designed by the Founding Fathers to insure the protection of individual rights within the context of a larger and ever changing society, and is worthy of a nominee to the Supreme Court.

Moreover, I am convinced that Mr. Rehnquist has an understanding and awareness of the needs and aspirations of minority groups. Thus, he stated during the hearings that he has come to realize "the strong concern that minorities have for the recognition of these (civil) rights." In answer to a specific question posed by the Judiciary Committee, he said that he had come "to appreciate the importance of the legal recognition of rights such as this without regard to whether or not that recognition results in a substantial change in customs or practice."

Mr. President, I have known Mr. Rehnquist for many years. During this time, I have been impressed with his character, human warmth, and legal scholarship. As a lawyer, I am fully cognizant of the importance of the Supreme Court in our democratic form of Government and believe that Mr. Rehnquist is eminently qualified to fill the position of Associate Justice and to make an important contribution to the tradition of judicial excellence which has characterized the efforts of many Justices who have served before him.

Senator **Stevens**. Mr. Chairman, I would like for you and the members of the committee to know that I have known Justice Rehnquist now since the early fifties. I knew him then as an honest, decent and very sensitive but very brilliant young lawyer. We were part of a group that came here right after we got out of law school, and I had many discussions with him in those days. As a matter of fact, I think we even had one night when we went out on a double-date together. We spent time together as young men.

The **Chairman**. So you worked together and dated together; is that it?

Senator **Stevens**. That is right.

Senator **Biden**. But not one another.

Senator **Stevens**. He was not my date, Mr. Chairman. [Laughter.]

I was pleased when his name was submitted in 1971 to become an Associate Justice, and I supported it then with a statement on the floor, which I will be pleased to put in the record again here today.

But I want the committee to know that I have been appalled at some of the things I have heard here. I have known this man for many years, and I am, I think you all know, a person who prides himself in believing that we have been part of a generation that has brought great change to this country, and Bill Rehnquist has been part of that change. And he has been a very steady member of the Supreme Court. And I would urge that you report his nomination to become Chief Justice. As Senator Biden has said, he is going to be on the Court in any event. He has been a good member of the Court; he has been a very steady member of the Court. And I think he will use his brilliance and his capability to be even a greater leader of the Court as Chief Justice than he has been as a member, as an Associate Justice. He has followed very closely, in my opinion, the lead of the current Chief Justice in recent years, and I consider Chief Justice Warren Burger as a close personal friend, and I have great admiration for him, too.

I think the President has made an admirable selection to be the Chief Justice of the United States, and I would like to go on record as completely supporting his nomination.

The **Chairman**. Thank you very much.

Are there any questions of Senator Stevens?

[No response.]

The **Chairman**. If not, you are excused, and thank you for your appearance.

Congressman Rudd, we are glad to have you with us.

STATEMENT OF HON. ELDON RUDD, MEMBER OF CONGRESS, STATE OF ARIZONA

Mr. **Rudd**. Thank you very much, Mr. Chairman.

I am very privileged to appear before this committee with this group of distinguished Senators and your distinguished committee. I thank you for giving me the privilege to come and testify before the committee.

The **Chairman**. If you have a statement, you can give it at this time.

Mr. RUDD. I would just like to say that I noticed my friend and late colleague from the other body, my body, is now a member of this great body—the newest member, and this committee. I note that Senator Broyhill occupies the last seat on the committee. Senator Broyhill is used to dealing from the front of the line rather than the back of the line, but he will get used to this in about 30 seconds, I think.

Mr. Chairman, Justice Bill Rehnquist is a thoroughly good person who has a distinguished, very scholarly judicial track record and has served our country very well in that regard. No one has been more upright, more dedicated, more sincere, more contributive to our Nation's highest court than has Bill Rehnquist.

There has been some note taken in the media recently of his possible prior affiliation with one of the two great political parties; but in doing so, the terms "liberal", "conservative", "left" and "right" have been used, terms that I do not use myself, although sometimes I am tabbed that way with one or the other. But the membership in question, I think, had to do with the Republican Party. And that is why I would like to just appear before you today, and I want to tell you that in May 1963 in this regard, which may be helpful, during the course of an impeachment proceedings, two Democratic Party members of the Arizona Corporation Commission, by a totally controlled Democratic Party Legislature in Arizona, the Arizona House of Representatives selected Bill Rehnquist to represent them in these proceedings. Bill's selection was inspired solely, only, because of his integrity, his reputation as a legal scholar, without any thought to his possible political affiliation. And I will tell you the impeachment failed in the Arizona Senate, I believe by one vote because of a failure to get a two-thirds vote in the body consisting of 28 members, 24 of whom were members of or affiliated with the Democratic Party.

The only current living member of that then body is, the Honorable Sam Steiger of Prescott, AZ. But I say that only to indicate that up to this point, no one has paid much attention to what his political affiliation may have been in that regard. And the confidence that the opposite party—and I am not even sure that he was a Republican at that time—but what has been termed "the opposite party" from what he was registered, took great pride in selecting him.

But Bill Rehnquist and his nomination by the President of the United States as Chief Justice has been heralded across the Nation as a most reasonable, a most laudatory action, and I sincerely urge this great committee to approve that nomination.

I thank you, Mr. Chairman, for permitting me to be here.

The CHAIRMAN. Thank you very much.

For those of you who do not know Congressman Rudd, he is from Arizona; he is a very able, hardworking, dedicated Congressman, and we are very pleased to have him make an appearance here.

Any questions?

[No response.]

The CHAIRMAN [continuing]. If not, thank you very much, Congressman.

Mr. RUDD. Thank you, Mr. Chairman.

The CHAIRMAN. We will now ask Justice Rehnquist to come back to the stand. And Justice Rehnquist, I wish to remind you again that you are under oath.

Justice REHNQUIST. I am aware of that, Mr. Chairman.

The CHAIRMAN. Now, yesterday, for the first round we announced we would allow 20 minutes. I think, today, we will go back to 10 minutes. We have 60 witnesses to hear from today so we had better get busy—or, at least 50, I believe, today, and 10 tomorrow.

So we have asked the members not to duplicate questions. If you listen, and the question has already been answered, there is no use going over and over again. We can save time by that. We want to cooperate in every way we can, but we must move on.

Mr. Rehnquist, I have several more questions here I did not quite finish yesterday, but to save time, we will now allow other members to question you.

We will now turn to the able ranking member, Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman.

Welcome back, Mr. Justice. I admire your physical constitution to sit as long as you did yesterday.

I spoke to my mother last night, and she said, "He did not get a chance to get up and leave, but you did. Are you going to keep him that long today?"

I want you to know, Mr. Justice, that the decision to keep you that long was totally the chairman's. [Laughter.]

And I want my mom to know that, too.

The CHAIRMAN. I might add, though, it was caused by long, drawn-out questions of some Democrats. [Laughter.]

Senator BIDEN. I might add for the record that you will find that there were more questions and more time absorbed by Republicans yesterday than by Democrats, as has been pointed out to me by two people in the press who kept a clock on. They pointed out every 20 minutes the bell went off for us; on an average, it was 22 minutes for you. At any rate, we do not want to talk about that.

The CHAIRMAN. Well, it is not very often, but sometimes the press is in error. [Laughter.]

Senator BIDEN. Mr. Justice Rehnquist, now that I have eaten up 2 of my 10 minutes, let me pick up where we left off, if I may, as I told you I would.

We talked—to bring you back in focus for a moment here with regard to the questions I was pursuing—about the role the Chief——

The CHAIRMAN. Excuse me just a minute. I noticed a long line of people out there that want to come to this hearing. Is there any reason they should not be brought in? Bring them in and fill up the chairs. They have got a right to be here if they want to. Fill every seat, and give them an opportunity to come in.

Senator BIDEN. We have got a couple empty ones up here.

Senator LEAHY. It depends if they are going to ask long questions or not, Joe.

Senator HATCH. We are willing to have them filled, of course.

Senator BIDEN. Do you think we might punch that clock again?

The CHAIRMAN. We will start over on the time.

Senator Biden. Mr. Justice, you and I spoke briefly yesterday about the role of Chief Justice Warren in the *Brown* case, and we ended, when my time was up, beginning to speak to the role of the Chief in the *Nixon* tapes case, which was as we both know—you, better than I—a different role; the Chief was in that case the one person that was slightly out-of-sync with the other eight Justices, according to historical—he ended up voting the same way, but the issue there was not the Chief bringing along a potential dissenter; the issue there was the Chief, who thought the tapes should be given up, having a rationale the same as the other eight Justices.

And I think it has been characterized by everyone as the Chief having compromised somewhat—not compromised in a bad way, but having compromised some to gain again total unanimity on the Court.

Is that your perception of how that occurred?

TESTIMONY OF HON. WILLIAM H. REHNQUIST, NOMINEE, TO BE CHIEF JUSTICE OF THE UNITED STATES

Justice Rehnquist. I do not have any perception of how that occurred, Senator. I did not participate in the case. I do not believe I saw any of the circulations. And it is just, really, as if I had not been there.

Senator Biden. Well, in the book "Brethren," the following exchange allegedly occurred, the following episode. When Nixon heard the results, the President said he hoped there would be "some air" in the opinion. He was speaking to General Haig. And Haig told him it was unanimous, and Nixon said, "Unanimous?" and Haig said, "Unanimous. There is no air in it at all."

"None at all?" Nixon asked.

"Haig. It is tight as a drum."

After a few hours spent complaining to his aides about the Court and the Justices, Nixon decided he had no choice but to comply, and 17 days later, he resigned.

Now, if that is correct, that Chief Justice Burger subsumed his view to the Court as a whole so that there would be a unanimous opinion on what we both had agreed yesterday was a critical decision, if that is true would you be prepared to do a similar thing?

Justice Rehnquist. I think the Chief Justice probably has a greater obligation than anyone else on the Court in those very rare, great cases where it is apparent that unanimity would be highly desirable to not only try to get colleagues together by way of consensus, but to himself adapt some of his views.

Senator Biden. I appreciate that answer, Mr. Justice, because this, as I have told you, is a very important part of my decision here. As I said, you are on the Bench, and you are on the Court, and God willing, you will stay on that Court in good health for some time to come. So the issue for me is the role of the Chief Justice here.

Let me ask you, do you believe, had you been Chief, would there have been the necessity in any of your 8-to-1 decisions where you were the dissent that you think you could have changed? I mean, can you imagine having changed? Do any of those decisions rise to that level?

Justice REHNQUIST. You are talking about cases in which I dissented in lone dissent?

Senator BIDEN. Where you were the one dissent.

Justice REHNQUIST. I do not have those readily before me. And I am trying to think whether any one of them might have. My feeling is no.

Senator BIDEN. Can you tell me why you dissented in the *Bob Jones* case?

Justice REHNQUIST. I do not believe I can, Senator, and the reason for that is that I think that would be a form of being called to account here before the Senate Judiciary Committee for a judicial act which I performed as a member of the Supreme Court of the United States.

My opinion, of course, is available, explaining reasons. But how I came to that conclusion I think is something that I think ought not to be inquired into here.

The CHAIRMAN. I think your reason is a valid one.

Senator BIDEN. Do you think that decision in the *Bob Jones* case was an important decision in terms of how black Americans think the Supreme Court thinks about them? I mean, do you think that is viewed as a seminal decision by black Americans?

Justice REHNQUIST. They would be better spokesmen than I would, but I should think—I do not know seminal, but I would say important.

Senator BIDEN. That was the one case where you—and I will go into it in my next round with you—your rationale—we can speak to your rationale, I assume, as written, was as I understand it, the end result of it was that had you been in the majority, we would have been able to continue to subsidize a private institution that is segregated. And that is not to suggest that was the reason you decided—we will go into that later. It related to your—well, I will not characterize it now.

The CHAIRMAN. Senator, I might say his opinion is available, and if you want to put it in the record, you are welcome to do that.

Senator BIDEN. I will put it in the record, and before the day is over, we will discuss it in detail. I am prepared to do that, and I am anxious to do that.

Let me if I may——

Justice REHNQUIST. Senator, if I might, the *Bob Jones* case was a statutory case, not a constitutional case in any significant way.

Senator BIDEN. No, I understand that. But the end result would have been, had you been in the majority, had your fellow Justices agreed with you, the end result would have been that Bob Jones would be able to continue to segregate and get Federal funding.

Justice REHNQUIST. The end result would have been that that would have been left up to Congress. Congress could have changed the law, as I saw it in my dissent, simply by a legislative act.

Senator BIDEN. Unless Congress changed the law, they would have been able to.

Justice REHNQUIST. Right.

Senator BIDEN You pointed out yesterday, and I thought with some great facility and clarity, that your role as you saw it for the Supreme Court to recognize and protect the rights of the majority.

And you talked about communities, and the right of victims, and the like.

Let me ask you a broader question. You point out—let me back up. It seems to me that the majority has ample access to at least two of the branches of Government in a direct electoral way, that they can make their will felt by showing up at the polls, and they do; and that oftentimes, that pure majoritarian role at the polling place, notwithstanding the fact that the Founding Fathers gave Senators 6 years instead of two to provide some——

The CHAIRMAN. Senator, your time is up, but he can answer this question.

Senator BIDEN. I guess the best way to put the question is this. Isn't part of the role of the Court, isn't the Court uniquely suited, more than either of the other two branches, to be the guardian of the rights of minorities?

Justice REHNQUIST. Yes, I think it is.

Senator BIDEN. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator LAXALT. Wrong State, Mr. Chairman.

The CHAIRMAN. Excuse me—from Nevada.

Senator LAXALT. I do not mind the association at all, however.

The CHAIRMAN. The distinguished Senator from Nevada.

Senator LAXALT. The Justice and I had an extended discussion yesterday, and he certainly cleared the areas of my concern, so I will follow the chairman's lead and pass on my time. However, Justice, there may be some matters arising that we might submit written questions to you.

Justice REHNQUIST. I would be happy to answer them.

Senator LAXALT. I will yield my time to Senator Hatch, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Mr. Chairman, I would like to point out a few things about the *Bob Jones University* case.

I happen to agree with the majority of the Court in that particular opinion. It is safe to say that of the four judges who ruled on the *Bob Jones* case before the Supreme Court, two of them took the view that the University was entitled to an exemption under section 501(c)(3) of the Internal Revenue Code. This demonstrates that the question was not an open and shut question as some of my colleagues would indicate. It should also be pointed out that District Court Judge Chapman ruled in favor of the University and believed that it was entitled to section 501(c)(3) exemption. And that is in a 1978 decision.

In the 2-to-1 fourth circuit ruling reversing the district court judge, Judge Widener dissented. He expressed his view that section 501(c)(3) exempted the University.

There have been a number of scholarly Law Review articles written that sustain and have supported the Government's section 501(c)(3) argument, including the prestigious Supreme Court Review for 1983, published by the University of Chicago Law Review. And of the 26 articles which were published on the case up to 1985, 18 of those articles were critical of the Supreme Court's majority decision.

Rightly or wrongly, the point I am making is that there were legitimately two sides to the question. And in the zeal to make points sometimes we fail to look at some of these very critical points.

I believe that Prof. Lawrence Tribe of the Harvard Law School, truly one of the great constitutional law professors in this country—with whom I disagree on a lot of occasions, and agree on some—severely criticized the Government's action in the case. However, he later published an article in the Indiana Law Journal that the Court's use of congressional inaction in *Bob Jones* was not a legitimate method of inferring congressional intent.

We can beat these things to death, but there are two sides to them. These are intricate, difficult questions, and it takes courage to stand up on one side or the other. I happen to have agreed with the one side, but that does not mean that there was not a legitimate point of view on the other side.

I waive the rest of my time.

The CHAIRMAN. All right. The distinguished Senator from Ohio.

Senator METZENBAUM. Mr. Justice, as this hearing develops, I think it is on a double track—maybe a triple track—one part of the track has to do with your ability to lead the Court, to be an individual who can weld the Court together. The second part relates to whether indeed, you are an extremist and relates to some of your opinions. But there is a third part that probably disturbs me as much or maybe more than any of the first two portions. That has to do—and I want to use the most sensitive language I can—with your credibility, with the honesty of your representations to this body in 1971 and the present time as well.

On the voter challenge issue, we have the matter of your making a specific representation to the committee at that time, and then we had the total disavowal yesterday as pertains to the facts. That is an issue that is still left unanswered because the witnesses will not be here until tomorrow. But it has to do not with whether you did or did not do something, but whether you did or did not represent the facts correctly to this body.

Then, the second part of that whole credibility question relates to your answer to Senator Leahy yesterday that you did not know of the typed-in restrictive covenant. This was a boilerplate form that had a typed-in restrictive covenant with reference to selling or leasing your property to any member of the Hebrew race.

Well, just as something on its face, something typed-in, a good lawyer, an excellent scholar, it certainly would have been normal to expect you would have noted that. I guess as one of the most knowledgeable people that graduated from Stanford high honors, everybody agrees you are extremely intelligent, and it almost stands out: "Hebrew race." There is no such thing as a "Hebrew race." It is the Hebrew religion. I mean, that would obviously be a point that almost would stand out. So, when you say you did not know about it, that concerns me. It is bad enough that it is in the deed; it is worse if it was in the deed, and if you knew about it in your representation to the committee.

And the third aspect having to do with the matter of credibility relates to your claim that the memo to Jackson was not representative of your views, but were those of the Justice himself. I had some questions of you yesterday on that subject, and I did not get a chance to finish. I have a few more.

But I wanted you to understand what is going through this Senator's mind as to one of the most important issues that I believe this committee has to deal with, and that is credibility, integrity.

The title of the memo is "A Random Thought on the Segregation Cases." If these were Jackson's views, why would you describe a statement of Jackson's views in that way?

Justice REHNQUIST. I do not know, Senator.

Senator METZENBAUM. Isn't it illogical—you wrote a two-page memo, and across the top was written, "A Random Thought on Segregation Cases." It just perforce comes out that that would be your thoughts, not his thoughts. The memo says, "I realize that this is an unpopular and unhumanitarian position for which I have been excoriated by liberal colleagues. But I think *Plessy* v. *Ferguson* was right and should be reaffirmed."

Now, if it is supposed to be Jackson's views, then was he excoriated by his liberal colleagues, and if so, who excoriated him—the other Justices?

Justice REHNQUIST. I was not a party to the conference discussion or any of the discussions of the Court on the *Brown* case.

Senator METZENBAUM. Well, I understand that. But what I am saying is that in the memo, and I am quoting your language, you state, "for which I have been excoriated by liberal colleagues." And this relates to the question of whether it is a memo from William Rehnquist, stating his views, or a memo which reflected the views of Justice Jackson, which is the point that you made. And in fact, you say, in your letter to Senator Eastland, "It was intended as a rough draft of a statement of his." And the word "his" is even underlined—"his views at the conference of the Justices, rather than as a statement of my views."

Again I am saying, Justice Rehnquist, that I am not questioning your views; I am questioning the reliability of your representations to the Senate back then in 1971, because that issue had been raised, and in order to put it to rest, you took the position that all that was in that memo was a rough draft of a statement of "his" views.

And I believe that—in fact, you even try to prove that point by saying, "Because of these facts I am satisfied that the memorandum was not designed to be a statement of my views on those cases," and again you underlined the word "my." And then at another point, you say, "I am fortified in this conclusion because the bald, simplistic conclusion that *Plessy* v. *Ferguson* was right and should be reaffirmed is not an accurate statement of my own views at the time."

My difficulty comes about by reason of the fact that the memo by its language, by everything in it, including its title, would indicate it was yours. But in your letter of December 8, 1971 when you were up for confirmation, you went to great lengths in a three-page letter to say to the chairman that it was not really your views that were being stated; those were the views of Justice Jackson. And I think you ought to have an opportunity to explain to us why that which would appear to be an obvious conflict with the facts was the statement of Mr. Rehnquist at that time, subsequently Justice Rehnquist.

Justice **Rehnquist**. I do not know if it was you, Senator Metzenbaum, or Senator Biden, that asked me about this yesterday, but one thing I said yesterday was that the thesis which is very roughly and very shortly, certainly, developed in the memo that most of the Court's mistakes up to that time had been reading its own moral notions into the Constitution was a view that Justice Jackson was a champion of. His entire book, "Struggle for Judicial Supremacy," is devoted to that thesis.

I also would like to point out—and I think that would conform to what I said yesterday—that one reason that makes me think it was not simply a memo of my views to him is that the bald statement that *Plessy* was right and should be reaffirmed was not an accurate reflection of my views at the time.

Also, I think that the tone of this particular memorandum is not the tone of a law clerk even expressing a great deal of his own opinions and submitting to a Justice; it is a tone of one equal speaking to another.

Senator **Metzenbaum**. Well, are you now saying that this memo that has the initials at the bottom, "W.H.R.," was not your memo?

Justice **Rehnquist**. I am certainly not saying that, Senator. The reason I know of the authenticity—I had no recollection in 1971 and do not have now of ever having actually sat down and written out these particular memos. I recognize the typescript. This was the way the office proceeded. I am sure this was typed by me, initialed by me.

Senator **Metzenbaum**. So it was your memo, and yet you went to great lengths to tell Senator Eastland that the memo reflected the views of Justice Jackson. And I have difficulty in reconciling the facts.

Here is the memo, which is very clear, and it is written as a memo from a law clerk to his Justice, and it goes on to say—it talks about all the things that—your position—and you actually state, "I have been excoriated by liberal colleagues."

My question to you is doesn't that absolutely make it your memo? It was your liberal colleagues who were excoriating you. Wasn't that the fact?

Justice **Rehnquist**. Senator, a lot depends on what you mean by "my memo." If you are suggesting that I am saying that someone else prepared the memo, no. The memo was prepared by me, typed by me.

The question that I understood you to be asking is whose views does the body of the memo contain. And there, I have answered you, I think it is principally, in fact, entirely, Justice Jackson.

The **Chairman**. The Senator's time is up, and you are a minute and a half over.

On this point about the deed, I might state that the Washington Post this morning had an article, headed, "Deed Excludes 'Hebrew Race'." I want to read a couple of excerpts for the record since this matter was brought up.

> Greensboro, Vermont, town clerk and treasurer Bridget Collier said in a telephone interview yesterday that it was unnecesary for Rehnquist to sign the deed

and that it carried only the signatures of John and Joan Castellvi, who sold the property to the Rehnquists.

"He did not necessarily sign anything," said Collier, who said she had no record of Rehnquist's signature on documents.

Collier said the language in the deed dates from 1933. "You find them (such restrictions) once in a while in some of the older deeds," she said, noting that the provision is no longer binding.

Collier said FBI agents asked for copies of the deed when they visited her office recently. "They asked me if that was a legally binding provision in Vermont, and I checked with the Secretary of State's Office and said 'no,'" she said

This article was written by Susan Benesche and Jonathan Karp.

Senator HATCH. Mr. Chairman, do I have any remaining time? I would like to make a point on the deed, along with the chairman.

Do I have some time left?

Senator HEFLIN. How much time does the chairman have left?

The CHAIRMAN. I have not taken any time yet.

Senator HATCH. Could I just take a minute, Mr. Chairman?

Let me just point out one thing.

The CHAIRMAN. Yes, go ahead.

Senator LEAHY. We have special clocks.

Senator HATCH. Under chapter 31 of the Vermont Code, entitled, "Discrimination," the appropriate provision which was enacted in 1967 is under section 1452, "Real Estate Exception."

> The sale, lease or other transfer of title occupancy or possession of real estate offered for sale or lease to the general public shall not be denied to any person because of the race, religion, creed, color, or national origin of that person.

I do not think anybody really gives much credibility to that argument. Everybody knows it is void under law. And some of these vestiges of the past do exist in boilerplate.

Senator LEAHY. Would the Senator yield for just a moment on that point?

The CHAIRMAN. We requested the FBI, at the request of Senator Leahy, to look into this matter.

The distinguished Senator from Iowa.

Senator GRASSLEY. Justice Rehnquist, when you are a law clerk, are there times that you should play devil's advocate and raise arguments that you may not always be in full agreement with?

Justice REHNQUIST. Yes, I think there are.

Senator GRASSLEY. Would private informal memos be used to raise and discuss such arguments?

Justice REHNQUIST. I think they were on occasion in Justice Jackson's chambers.

Senator GRASSLEY. OK. Well, then, Justice Jackson did ask you to prepare memos making arguments for a position with which you might not agree?

Justice REHNQUIST. It was not necessarily that he would say, "You do not agree with this position so make an argument." But he would say, "I want both sides presented."

Senator GRASSLEY. OK. Justice Rehnquist, after several decades of legal experience and including your 15 years on the Supreme Court, do you personally agree with everything that was said in these private, informal memos to Justice Jackson?

Justice REHNQUIST. No, no, I do not.

Senator GRASSLEY. And of course, isn't this true then of the Justice Jackson memo that is under discussion at this point?

Justice REHNQUIST. Yes, I certainly tried to make clear to the committee that I did not agree then, and I certainly do not agree now, with the statement that Plessy against Ferguson is right and should be reaffirmed.

Senator GRASSLEY. Mr. Chairman, I have no more questions at this time.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman.

Justice Rehnquist, I want to proceed with some questions regarding the 14th amendment and your interpretation of it. Scholars of your decisions agree that you have a limited view of the 14th amendment—limited in comparison to some of the other decisions that the Supreme Court has handed down. I do not say that critically. I just state that as what some scholars have said. These scholars, in reading your opinions, suggest that it is your view that the 14th amendment should apply only to racial discrimination.

Do you agree with that analysis?

Justice REHNQUIST. No, I do not.

Senator DECONCINI. Do you believe that women should have equal rights as men have under our Constitution?

Justice REHNQUIST. Yes, I certainly do.

Senator DECONCINI. And does that fall within the 14th amendment, in your judgment?

Justice REHNQUIST. Yes, I think it does.

Senator DECONCINI. Do you believe that permanent resident aliens should have equal rights with citizens?

Justice REHNQUIST. If you are asking me, Senator, whether under the Constitution——

Senator DECONCINI. Under the Constitution.

Justice REHNQUIST [continuing]. Permanent resident aliens should have equal rights, there has been disagreement on our Court about that. And I do not know that any of the positions would be phrased in terms of saying that permanent resident aliens ought to have every right that a citizen does.

For example, I do not think anyone on our Court has contended that a permanent resident alien ought to be entitled to vote even if a State statute says that you have to be a citizen to vote. But there is no question that the 14th amendment protects permanent resident aliens; it is just a question of how much it protects.

Senator DECONCINI. So who makes that determination—the court?

Justice REHNQUIST. Yes; if a claim is made under the 14th amendment on behalf of a permanent resident alien, a court would have to decide it.

Senator DECONCINI. If the popular elected branches of Government want to ensure equal rights for some segment of our society—say, women—what do you think of a constitutional amendment to guarantee equal rights for women?

Have you ever taken a position on that?

Justice REHNQUIST. Yes, I think on behalf of the Justice Department, I presented the administration's view that the ERA should pass.

Senator DECONCINI. Should pass?

Justice REHNQUIST. Should pass, yes.

Senator DECONCINI. When was that done, Justice?

Justice REHNQUIST. I think it was in 1971. It was when I was in the Justice Department.

Senator DECONCINI. Did you write a memo, or something to that effect?

Justice REHNQUIST. I presented testimony which had been prepared for me.

Senator DECONCINI. And do you have copies of that testimony?

Justice REHNQUIST. No. I would think it would be in the records. As I recall, it was a House committee, because I remember Congressman Wiggins gave me a very hard time on the testimony.

Senator DECONCINI. Your recollection is that you presented the administration's position in support of passing the equal rights amendment?

Justice REHNQUIST. Yes, it is.

Senator DECONCINI. Was that your view personally, too?

Justice REHNQUIST. I had reservations, I think, at the time. You know, I could see arguments pro and arguments con. But I do not think I was as enthusiastic—I thought there were more problems with the ERA than the administration's position would have indicated.

Senator DECONCINI. So you took the administration's position to support the ERA because that was your job and your position at the Justice Department?

Justice REHNQUIST. Yes, yes.

Senator DECONCINI. Had you exercised, or do you remember giving your opinion prior to that position being taken? Were you part of the process, in other words, of what that——

Justice REHNQUIST. Oh, sure; I am sure there was discussion back and forth, and it was just simply resolved.

Senator DECONCINI. And in any event, officially, you stood by the Justice Department's position or the administration's position, which was clearly in support of the equal rights amendment.

Justice REHNQUIST. Yes, I did.

Senator DECONCINI. Justice Rehnquist, some of your critics have attempted to make much of the fact that you have written so many dissenting opinions. I believe that the criticism is unfair and quite frankly irrelevant.

Let me ask you some questions. Do you believe that it is your responsibility to keep voicing your view on an issue even if stare decisis leads the Court to decide a specific case in another way?

Justice REHNQUIST. I think generally, yes, Senator, that if one sees a constitutional issue a particular way and simply is not persuaded, that in most cases it is a part of a function of a judge to say something in dissent.

I think on statutory cases, it may be somewhat different. The ballgame is over when the Supreme Court decides a statutory case. Congress can change the result if they do not like it. And I think there, a dissent, particularly a sole dissent, has a good deal less to be said for it.

Senator DECONCINI. So it is your position of course, if I can assume, that you will continue to dissent when you feel the compelling legal reasons to do so, but less so in the cases where stare decisis is applied to a statute.

Justice **Rehnquist**. Exactly, Senator.

Senator **DeConcini**. That does not mean that you would not dissent, but less so?

Justice **Rehnquist**. Yes.

Senator **DeConcini**. Do you believe there is much difference in one Justice dissenting or two Justices dissenting or more?

Justice **Rehnquist**. I never thought a great deal about it, to tell the truth. It is regarded as some evidence of the strength of the majority opinion, the number of dissents it attracts. But I had never thought there was a lot of difference between one Justice and two Justices dissenting, other than the obvious fact that the numbers are different.

Senator **DeConcini**. Isn't the number of times one votes with the majority and the number of majority decisions one is selected to write a better example of one's position with respect to the "mainstream" of thought on the Court?

Justice **Rehnquist**. Yes, I think that is quite right, Senator.

Senator **DeConcini**. And you measure up rather well in that criterion, do you not?

Justice **Rehnquist**. I think so, when compared with a number of my colleagues; the number of times I have been with the majority as opposed to in dissent is greater for me than with some of my colleagues.

I am by no means the person that is most often with the majority.

Senator **DeConcini**. Thank you, Justice Rehnquist.

I just want to comment on the question that was raised regarding the deed and your property in Vermont. I am satisfied with the explanation you gave yesterday. I also would suggest to my friends that maybe they should look at all their deeds. I have not done that myself, but having several pieces of property in the State of Arizona, it would not surprise me if some of them might have embarrassing clauses that were put there before I was born. And I certainly would resent anybody—and I am not accusing anybody of doing that—who raised the issue that I was unsensitive to the Hebrew religion or any other sect, because I do not think that is the case at all. And I think the Senator from Vermont spelled it out very clearly yesterday. There is a procedure to rectify the problem of the restrictive covenant. I understand from the testimony yesterday that you are prepared to rectify this situation, even though it may not be necessary, to demonstrate your sensitivity to that subject matter.

Justice **Rehnquist**. Yes, I am.

Senator **DeConcini**. I thank you.

Thank you, Mr. Chairman.

The **Chairman**. The distinguished Senator from Kentucky.

Senator **McConnell**. Mr. Chairman, I will be happy to yield back my time.

The **Chairman**. The distinguished Senator from North Carolina.

Senator **Broyhill**. Mr. Chairman, this committee has a great number of witnesses that are waiting to testify, and I would like to yield back my time so that we can finish our work. It seems to me that we need to move ahead.

Senator **Leahy**. Mr. Chairman.

The **Chairman**. The distinguished Senator from Massachusetts. The next one would have been Vermont, but I can take you since you are ranking. What do you want to do.

Senator **Kennedy**. I have got some questions.

Senator **Leahy**. Certainly, I will yield to the Senator from Massachusetts.

Senator **Kennedy**. Thank you.

Senator **Heflin**. I will yield, too, to the Senator from Massachusetts.

Would you yield, Senator Simon?

Senator **Simon**. Yes.

Senator **Kennedy**. I hope my time is starting now.

The **Chairman**. Ten minutes, Senator.

Senator **Kennedy**. Mr. Justice, the Senator from Vermont brought up some questions yesterday about the restrictive covenants in certain titles, and Senator DeConcini has referred to it again.

The FBI report indicates that also on October 24, 1961, you obtained a title to lot 3, which is in the Palmcroft subdivision in Phoenix, AZ.

Are you familiar with that?

Justice **Rehnquist**. Certainly, we owned a home in Palmcroft, AZ from about——

Senator **Kennedy**. Well, did you acquire it in 1961?

Justice **Rehnquist**. Yes, that sounds right.

Senator **Kennedy**. And October 24 sounds like about the time?

Justice **Rehnquist**. Yes, that sounds right.

Senator **Kennedy**. Do you still own that?

Justice **Rehnquist**. No.

Senator **Kennedy**. You sold it. When did you sell it?

Justice **Rehnquist**. I believe early 1969.

Senator **Kennedy**. On that particular provision, there is a report by Mrs. Gladys Cavett, who is the Customer Service Department, Arizona Title Co., who advised that further research of the records of the title company revealed a warranty, deed number 328623, dated July 30, 1928, relating to lot 3 of the Palmcroft subdivision, Maricopa County, AZ.

And article 11 of the warranty deed is as follows:

> No lot nor any part thereof within a period of 99 years from the date of filing of the record on the plot of Palmcroft shall ever be sold, transferred or leased to, nor shall any lot be a part thereof, within said period be inhabited by or occupied by any person not of the white or Caucasian race.

Were you familiar with that particular provision?

Justice **Rehnquist**. I certainly do not recall it, no.

Senator **Kennedy**. Well, would you have read through the warranty deed when you bought the land? Do you have any recollection? It is a long time ago.

Justice **Rehnquist**. It is 1961. I simply cannot answer that, Senator. It was a title company transaction, I think, and one relies on the title company for the sufficiency of the deed.

I simply cannot answer whether I read through the deed.

Senator **Kennedy**. But you have no knowledge whether in that warranty—you did not examine the warranty deed about any restrictions on the property?

Justice **Rehnquist**. I certainly have no recollection of it.

Senator **Kennedy**. Would you now, if you purchased property?

Justice **Rehnquist**. Would I——

Senator **Kennedy**. Yes. Would you now examine the warranty if you purchased property today?

Justice **Rehnquist**. Well, if a lawyer were handling the thing for me, and there were any sort of a complicated warranty, I think I would tend to rely on the lawyer.

Senator **Kennedy**. Even when you are familiar that there were those kinds of restrictions in many parts of the country—I expect even in my own part—with regard to either Caucasians, whites, blacks, or Jews?

Justice **Rehnquist**. Your question is would I examine a warranty deed now?

Senator **Kennedy**. Yes, to see if there is any restriction. Would you care if you joined a country club or something that restricted women or Jews——

Justice **Rehnquist**. Oh, no, certainly not.

Senator **Kennedy** [continuing]. Or blacks?

Justice **Rehnquist**. No.

Senator **Kennedy**. Well, you would know about that, then. You would find about that before you made application, I assume.

Justice **Rehnquist**. Yes, I would.

Senator **Kennedy**. Well, would you check and see if there were any restrictions in terms of the purchase of property?

Justice **Rehnquist**. Well, in terms of—yes, I think I would.

Senator **Kennedy**. Well, you did not before, evidently; you did not in 1961.

Justice **Rehnquist**. It simply had not occurred to me.

Senator **Kennedy**. Well, when did it start occurring to you?

Justice **Rehnquist**. Well, the discussion today, or last evening certainly has brought it out. [Laughter.]

Senator **Kennedy**. Well, you do not think that you should have before, any time? You do not think you should have before today, or yesterday?

Justice **Rehnquist**. Well, I must say my normal approach in looking at a statement, or a statement of title, was does it convey good title and that sort of thing. I certainly not only thought, but knew, that this sort of a covenant is totally unenforceable and had been for years, since a Supreme Court decision a long time ago.

So, while very offensive, it has no legal effect.

Senator **Kennedy**. Well, did you sign the deed of transfer when you sold the property?

Justice **Rehnquist**. I am sure I must have.

Senator **Kennedy**. Well, was the restriction still in it then?

Justice **Rehnquist**. I cannot answer from my own knowledge, but certainly, we had done nothing to remove it, as I recall, in the years—I would think it probably was.

Senator **Kennedy**. Let me go to the *Laird* v. *Tatum* situation Mr. Justice.

You wrote a memorandum justifying your decision to sit on the case, did you not?

Justice **Rehnquist**. Yes, I did.

Senator KENNEDY. And you talked about the ABA standard, that it talked about not just impropriety, but the appearance of impropriety, and you basically had already made up your mind about that issue and about the very case that raised the issue in *Tatum* v. *Laird*. And I would suggest there was no abstract constitutional question. You were discussing the very case you later decided to rule on. You told Senator Ervin when you thought about the merits of the case, which was then in the court of appeals. You in the case arrived on the Supreme Court decision, sat on the case, and made the ruling, and cast the deciding vote, 5-to-4.

In your testimony before Senator Ervin in the subcommittee you said,

> My only point of disagreement with you is to say whether, as in the case of *Tatum* v. *Laird* that has been pending in the court of appeals here in the District of Columbia, that an action will lie by private citizens to enjoin the gathering of information by the executive branch, where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the government.

One of the obviously fundamental principles of the judicial system is that the judges have to be fair and impartial, and judges are not supposed to sit on cases where their minds are already made up.

You had basically made up your mind on that issue, had you not, Mr. Rehnquist?

Justice REHNQUIST. Senator, as you say, I prepared a memorandum considering the request that I disqualify myself in deciding that I was not obliged to, and that I should not. I think disqualification is a judicial act, and I do not believe that I ought to be in a position here of defending something that I did in that capacity as a Supreme Court Justice.

Senator KENNEDY. Well, the question, I think, is whether you had taken a position on it. This is not what you may consider an ordinary case. It was involving the demonstrators—it involves first amendment rights—demonstrators, surveillance by military personnel. You basically resented those demonstrators. Now you had a chance to do something about it. You indicated what your position would be; whether it was a justiciable cause, in response to an exchange with Senator Ervin. You made up your mind evidently that those demonstrators were not going to get their way in the Supreme Court, even if you had to sit on the case to break a tie, even if you had to violate the ABA rules and the fundamental principles of justice to do it. I thing that is wrong. I am not alone in that thinking. I do not know if you are familiar with the articles that were written by Jack MacKenzie about this case. It says, "Justice Rehnquist called this exchange"—the one I just read, where you indicated that there was not a justiciable cause in the *Tatum* v. *Laird*—"in his memorandum, 'a discussion of the applicable law' "—these were the words you used in your memorandum on this issue. And then MacKenzie continues, "But this, as all lawyers will recognize, and most lawyers will freely state, is not a mere discussion of the applicable law; it is a statement of how the law should be applied to a particular case. And, try as he might to restate the matter, Rehnquist judged the rights of parties after giving his view."

What is your reaction to MacKenzie's conclusion on this as well?

Justice **Rehnquist**. That I was performing a judicial act, and that——

The **Chairman**. The Senator's time is up, but we will let him answer this question.

Justice **Rehnquist** [continuing]. I ought not to be called upon somewhere else to justify this.

Senator **Kennedy**. Mr. Chairman, I would just ask that the Rehnquist memorandum, the exchange with Senator Ervin, and the McKenzie article be printed in the record.

The **Chairman**. Without objection, so ordered.

[Documents follow:]

a riot, again which is close to associational rights. That the executive branch or the legislative branch may not even propose legislation like that, that the executive branch may not submit it or that Congress may not even debate it, is, I think, the logical conclusion to be drawn from such a broad extension of the chilling effect doctrine.

In short, I think you have got to have some governmental sanction imposed on the person before you get a first amendment problem.

Senator ERVIN. What more sanction can you have imposed on people than for the military, for example, to send military agents to photograph people and have helicopters flying overhead to watch them? Isn't that governmental sanction?

Mr. REHNQUIST. No, it is not a governmental legal sanction, in my opinion.

Senator ERVIN. What is it? In other words, I don't think that the Constitution permits the President of the United States to use military forces to discharge functions of a national police force or to spy on the civilian population of this country.

Mr. REHNQUIST. Well, certainly the Posse Comitatus Act places substantial limitations in that area.

Senator ERVIN. But it does not authorize the President to use the military except to suppress insurrection against the Government or violent actions which are so serious in nature as to obstruct the enforcement of the Federal Constitution or Federal laws or interfere with the ordinary course of justice in the courts. That is all the power he gets under the Constitution and under the acts of Congress implementing the Constitution.

There is not a syllable in there that gives the Federal Government the right to spy on civilians; that is, which gives the Army the right to spy on individuals who are not connected with the military. Yet we even had them spying on people in churches where presumably they had gone to worship the Almighty according to the dictates of their own consciences.

Mr. REHNQUIST. Well, as I say, I think that was unauthorized and reprehensible. I do disagree with you as to the first amendment question.

Senator ERVIN. Well, do you agree with me that the legislative branch of the Government has no right to collect information which tends to stifle the individual's inclination or desire to exercise his first amendment rights?

Mr. REHNQUIST. I agree with that it can't collect it by compulsory process.

Senator ERVIN. But you do take the position that the Army or the Justice Department can go out and place under surveillance people who are exercising their first amendment rights even though such action will tend to discourage people in the exercise of those rights?

Mr. REHNQUIST. Well, to say that I say they can do it sounds either like I am advocating they do it or that Congress can't prevent it or that Congress has authorized it, none of which propositions do I agree with.

My only point of disagreement with you is to say whether as in the case of *Tatum* v. *Laird* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.

Senator **Ervin**. Well, now, this information that is collected goes into the Government files, doesn't it, and it is used to determine whether a man will be employed to work for the Government, and in some cases it is even made accessible to private industry for them to determine that question; is this not true?

Mr. **Rehnquist**. I am not certain what use was made by the information gathered by the Army. The Justice Department has its own investigation made at the time a person seeks employment and, so far as I know, the information gathered by the Army was not used by the Department.

Senator **Ervin**. We have a great deal of difficulty finding out what use the Army made of it. As a matter of fact, it appears here from testimony that the second in command of the military intelligence didn't even know that the information was over at Fort Holabird in a computer, and still they want us to believe some little doughboy who was sniped at in the Detroit riots was in some way hep to that information when the second in command of military intelligence didn't even know where it was or what it was.

In a dissenting opinion in a case from Arkansas where the State of Arkansas required teachers to make a disclosure of all the organizations they had belonged to for 5 years, Justice Harlan dissented from the ruling that the information sought there didn't serve a legitimate State purpose, but he laid down this proposition: he said when the Government goes to exercise its investigatory power there are two questions that have to be answered. The first is that the information which the Government seeks must be for a legitimate governmental purpose and, second, that even if it is for a legitimate governmental purpose, it must be relevant to the accomplishment of that purpose.

Do you agree that is a correct statement of law?

Mr. **Rehnquist**. Certainly I agree when the Government seeks to obtain it either by threat of discharge from a job or by threat of compulsory process.

Senator **Ervin**. But you think the executive branch of the Government can go out and obtain it either by overt or covert methods, and no constitutional question is involved even though it may intimidate people in the exercise of their first amendment rights?

Mr. **Rehnquist**. Senator, I think you are putting words in my mouth which I have no desire to have put there. I do not think there is a first amendment violation in that situation. However, the general authority of the Government to do that, or when Congress has authorized it, these situations may present an entirely different question.

Senator **Ervin**. The inference I would draw is that the power of the Congress under the Constitution is inferior to that of the executive branch of the Government.

Mr. **Rehnquist**. Certainly I would hope you wouldn't draw it from anything I have said because I don't believe that.

Senator **Ervin**. Well, in other words, a congressional committee can't get information about people under certain circumstances but the Army or any other Government agency can go out and collect that

THE APPEARANCE OF JUSTICE

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A JUDGE AND HIS CAUSE

"Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion, to recuse him before issue joined, so that the cause go to another."

Justinian Code

"No man can be a judge in his own cause."

Sir Edward Coke (1614)

Just as the independence and the impartiality of a court seem to go together, so is it hard to separate an attack on a court's independence from an attack on its ability to be fair. Any time a president of the United States—be he Nixon, Roosevelt, or whoever—makes a political issue of his determination to "turn the Supreme Court around," there is an attack on the court's independence that is fraught with danger for justice and the appearance of justice. Some conservatives may smack their lips at the hope for change, liberals may quail at the prospect of lost civil liberties; but thoughtful persons of left and right and middle will be concerned over the politicization of the highest court. The concern will be no less when the Court is conservative and its attackers are liberal.

Periods of such marked and conspicuous change put a heavy strain on judicial ethics. Failure of a jurist to abide by high ethical standards can exacerbate the tensions that already run high when the courts are confronted by highly emotional, somewhat political, and deeply divisive issues. Observance of ethical restraints can ease tension and produce judicial decisions that are not only more fair, but that are also perceived as such.

Even under fairly normal circumstances, the changes in Supreme Court personnel can be unsettling to the law. Justice Felix Frankfurter, in a 1950 dissent from the Court's third change of direction in search-and-seizure law in three years, complained: "Especially ought the court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the court's composition and the contingencies in the choice of successors." In the spring of 1971, Justice Hugo L. Black dissented from an overruling made possible by the replacement of two justices by Nixon appointees. "This precious fourteenth amendment American citizenship should not be blown around by every passing political wind that changes the composition of this court," said Black. "While I remain on the court I shall continue to oppose the power of judges, appointed by changing administrations, to change the Constitution from time to time according to their notions of what is 'fair' and 'reasonable.' "

In the fall Black was gone, and with him John Marshall Harlan, and the winds of change were stirring anew. After a period of surveying a field of unqualified candidates, a period that itself was disquieting to those who appreciated the loss of the two judicial giants, the Nixon administration at last came up with two qualified nominees, Lewis F. Powell, Jr., and William H. Rehnquist. Both men were aptly classified as "conservatives," and even allowing for some slippage between a president's expectations and a justice's performance, the third and fourth Nixon nominees were certain to have a profound effect on the Supreme Court's future course. Powell's prestige and the moderation that for the most part had tempered his philosophy enabled him to sail through Senate confirmation with but a single dissenting vote. Rehnquist, however, had been the cutting edge of Nixon's major differences with Congress, civil libertarians, and civil rights advocates. His confirmation on December 11, 1971, by a vote of sixty-eight to twenty-six, followed a bitter battle during which senators—both those who opposed him and some who ended up voting for him were frustrated in their efforts to question Rehnquist about his views because he invoked the "attorney-client" privilege as the president's "lawyer's lawyer."

This chapter deals with how Rehnquist responded to the ethical issues raised by his sitting in judgment on matters deeply affecting his former client, the president. The sad conclusion—sad because it must be made of a jurist with brains, ability, and dedication to the Court—is that Rehnquist's performance was one of the most serious ethical lapses in the Court's history. Sad, too, because his behavior, documented in his own extraordinary memorandum justifying his conduct, came at an ethical watershed when the distress of past scandals was supposed to be behind us. The memorandum, the only one ever published by a justice in response to a motion to disqualify himself (such motions are themselves almost as rare), is itself a monument both to Rehnquist's technical ability and to his ethical shortsightedness. If the standards set forth in the memorandum are allowed to stand for Supreme Court justices or for the lower federal judiciary, we shall have learned nothing for all our anguish.

Rehnquist had been through much of the anguish himself, first in giving advice to Attorney General John N. Mitchell during the Fortas episode in the spring of 1969, later that year as the lawyer trying to usher the Haynsworth nomination through the Senate, and in 1970 while performing similar functions for both the Carswell and Blackmun nominations. Indeed, he appeared to have learned from the Haynsworth fight that whatever might be said in judgment of that unfortunate nominee, the Senate had opted for a stricter ethical standard for the present and future. The Justice Department's correspondence with the Senate Judiciary Committee over Justice Blackmun's finances carried a notation that perhaps the old disqualification statute itself had been given a stricter modern meaning by the way the Senate interpreted it in the Haynsworth vote. And Rehnquist, quite possibly the author of that comment, testified at his own hearing that as a justice "my own inclination would be, applying the standards laid down by [the disqualification law] and to the extent there is no conflict between them and the canons of judicial ethics, to try to follow that sort of stricter standards that I think the Senate, by its vote, indicated should prevail."

Senators had been anxious to know whether Rehnquist would consider himself qualified to sit in the forthcoming test of the president's power to wiretap, in the name of national security and without court authorization, individuals classified by the executive branch as domestic subversives. After many questions on the subject, Rehnquist assured the Judiciary Committee that since he had given key legal advice in the preparation of the Justice Department's position before the Supreme Court, he would not sit in the case although he did not personally sign the government's legal brief. Similar anxieties were expressed about Powell's participation in the same case, in view of his strong published statements that opponents of wiretapping were exaggerating its dangers. (Justice Rehnquist did indeed recuse himself in the case as the Court rejected the Justice Department's position by an eight to zero vote in an opinion by none other than Justice Powell.) Rehnquist indicated also that he would not sit in another important case, testing the power of prosecutors, grand juries, and even congressional committees to give only limited or "use" immunity from prosecution rather than total immunity when coercing them into giving self-incriminating testimony. In that case Rehnquist had actually signed the brief and had been prepared to argue for the government in support of such power. (The decision, which incidentally upheld the constitutionality of the procedures later used to squeeze testimony from many Watergate suspects, was by a five to three vote, with Justice Powell again writing the majority opinion.)

The most ethically sensitive cases that faced Rehnquist were the *Branzburg* and *Tatum* cases. The *Branzburg* case pitted much of the newspaper industry against the government's claimed power to subpoena unpublished and sometimes confidential information from newsmen Paul M. Branzburg of the *Louisville Courier-Journal*, Earl Caldwell of the *New York Times*, and Paul Pappas of television station WTEC-TV in New Bedford, Massachusetts. The *Tatum* case, which would ultimately produce the famous Rehnquist memorandum, raised the question of whether peace workers and antiwar groups could take the government to court over the army's program of surveillance, infiltration, intelligence gathering, and dissemination to other federal agencies of information about law-abiding civilians.

Another case with a lurking though perhaps a more tenuous ethical question was the *Gravel* case, involving the government's attempt to elicit grand jury testimony about the source of the copy of the Pentagon Papers that came into the hands of Senator Mike Gravel, Democrat of Alaska, and that he published after unsuccessfully trying to make it a part of Congress's official record. Rehnquist as assistant attorney general had fired the first volley in the Pentagon Papers fight by telegraphing editors at the *New York Times* and *The Washington Post* to ask voluntary suspension of publication, a request that, when refused, was converted into a demand and a court complaint to enjoin publication. So far as anyone knew, Rehnquist had little to do with the Pentagon Papers after dealing with the issue of prior restraint on their publication by the press (decided in the newspapers' favor in June 1971) and before his Supreme Court nomination the following October. While the *Gravel* case also involved the Pentagon Papers and whether they could be lawfully disclosed to the public, the legal issues were different. While Justice Rehnquist clearly would have been disqualified from the prior restraint case, it is harder to insist on the basis of known facts that he should have stayed out of the *Gravel* case.

Although it was not a surprise to see Justice Rehnquist on the bench taking part in the *Gravel* hearing, it was a shock to see him there when the *Branzburg* and *Tatum* cases were called for oral argument. Assistant Attorney General Rehnquist had been the Justice Department's chief public spokesman, second only to the attorney general himself, for the Justice Department's controversial policy of subpoenaing newsmen for investigations of Black Panthers and other groups. On one occasion immediately recalled by newsmen, Rehnquist had appeared in the role of administration spokesman to defend the department's 1970 subpoena guidelines, which his Office of Legal Counsel had helped to prepare. He played the apologist's role on a panel of commentators that included critics of administration policy. The guidelines were instructions to United States Attorneys' offices across the land, and they served as "litigating" material that the government cited in every court case to show the reasonableness of Mitchell's policy. Justice Rehnquist, from the outset of his Supreme Court service an active questioner from the bench, showed no consciousness of impropriety in his frequent give-and-take discussions with counsel for the three newsmen. He said nothing, however, during the entire oral argument in the *Tatum* case, perhaps signaling that it did involve an ethical question on which he was reserving judgment. This unaccustomed reticence only added confusion to the stunned surprise of counsel for Arlo Tatum, director of the Central Committee for Conscientious Objectors, and the other political dissenters who were trying to maintain their suit against the army. Did Rehnquist actually intend to vote in the case or was he merely sitting to hear the case out of interest? Was he there on some sort of provisional basis to determine for himself whether his previous involvement was disqualifying? Unlikely as this was, did not this possibility counsel caution to anyone tempted to move to strike the justice from the case? If the justice were inclined against participating, a move to recuse him might offend not only him but perhaps others on the Court as well. Senator Sam J. Ervin, Jr., the North Carolina Democrat whose outspoken defense of privacy rights and First Amendment freedoms later entered millions of American households through televised coverage of the Watergate hearings, was more sensitive than most to why Justice Rehnquist should not sit; but sitting alongside lawyers from the American Civil Liberties Union in the High Court's hearing room, he quietly counseled the cautious approach. Ervin, who joined the argument as a friend of the court on the side of the civilian plaintiffs, was unwilling to assume the worst. He recalled that when he argued in the *Darlington* labor cases, Justice Potter Stewart sat on the bench but dropped out when something said at the hearing reminded him of a close association with a textile official.

Broadly, Rehnquist was considered disqualified because of his role as principal administration defender and witness at extensive hearings on military surveillance held before Ervin's Subcommittee on Constitutional Rights. There Rehnquist stated that the Pentagon program, however unwise or regrettable, did not violate anyone's constitutional rights. Specifically and crucially, he had testified that the *Tatum* lawsuit, which was pending in lower courts while the Ervin hearings were under way, was not "justiciable"; that is, it was the kind of lawsuit that courts should and would dismiss as judicially unmanageable. This was the very issue in the case when it reached the Supreme Court.

Furthermore, Rehnquist had made clear to Ervin the department's determined resistance to any legislation attempting to control the military practices—which he said had stopped anyway—or to any attempt to impose a judicial remedy by statute. The problem was best left to the "self-discipline" of the executive branch, Rehnquist testified in a vein that later became so much more familiar to Americans when the war and Watergate were aired publicly.

Central to the administration's position that there was no violation of constitutional rights was its contention that nobody had been hurt. It was not enough, in this view, that there was no congressional authorization for the program, or even that the military exceeded its constitutional bounds by intruding into the civilian sector of American life. The program would have been unconstitutional not because of its mere existence, but only if it actually infringed the rights of specific plaintiffs who went to court. According to the *Tatum* complaint, the surveillance did just that by threatening the privacy of political dissidents and hindering their exercise of First Amendment rights of free speech, assembly, and political association. But, said the Justice Department, Tatum and his friends were not hindered; they continued meeting, marching, protesting the war, and they even went to court to assert their rights to do so. Tatum countered by pointing to that portion of his complaint that specified that other less hardy souls were indeed inhibited from associating with the Tatums and other protesters. It was not denied—indeed, it could not be denied under the rules of pleading. When a party moves to dismiss a lawsuit without undergoing a trial, it must accept every charge in the complaint as true, at least for the sake of argument, and then go on to show the court that there is no case under the law even if all the charges are true.

In large measure the case came down to how one viewed First Amendment rights and the measures necessary to safeguard them. To civil libertarians, First Amendment rights are not only basic, they are also very fragile. They need the solicitude of courts—what Justice William J. Brennan, Jr., calls "breathing space"—to survive. Government conduct that discourages free expression may defy precise measurement, since the identities of those discouraged are often by definition unknown and unknowable. When the federal government or a state is challenged on these grounds, it conventionally argues that there is nobody in the case with the requisite injury, no one with the kind of legal standing to make the case judicially manageable.

This description of the issues might seem weighted on the side of the *Tatum* plaintiffs, but it is their perspective that must be appreciated when considering their ethical complaint. The rest of the ethical issue is whether the complaint was grounded on a reasonable fear that the jurist was biased against them. They said that they felt just such a fear about a jurist who not only was out of sympathy with their cause but also had publicly stated his opinion that they had no case.

On June 29, 1972, the Supreme Court ruled against the newsmen. Three days earlier the Court had ruled that the *Tatum* lawsuit should be dismissed without a trial to examine the Pentagon practice or to demonstrate the alleged injuries. Each time the vote was five to four and each time the four Nixon appointees—Chief Justice Burger and Justices Blackmun, Rehnquist, and Powell—were joined by Justice White to make the majority. In each case the dissenters were Justices Douglas, Brennan, Stewart, and Marshall. By the same margin and by the same lineup the Court rejected the contention of Senator Gravel, which the Senate itself had supported, that the senator and his aide were constitutionally immune from inquiry into the acquisition of the Pentagon Papers. On these highly contested issues at least, the Supreme Court had indeed been turned around, the result swung by appointees of a different philosophy.

With little hesitation, both the American Civil Liberties Union on behalf of the *Tatum* plaintiffs and Senator Gravel decided to seek a rehearing and disqualification of Justice Rehnquist. Although the newsmen and their lawyers appeared to have a stronger claim than Gravel to an ethical challenge, it was not in their strategic interest to file a protest and they did not. In two of the three cases the withdrawal of Justice Rehnquist would not have made a difference, since a four to four vote would only affirm their contempt convictions for refusing to cooperate with grand juries; the third newsman, Caldwell, by this time was no longer sought by the grand jury. Some counsel privately expressed reluctance to appear to join a cabal of dissatisfied litigants in moving against Justice Rehnquist in so personal a manner. Unquestionably the course of moving to disqualify a justice would be a disagreeable, abrasive process, but the ACLU deemed the legal issue clear enough. If they had been silenced by a Velvet Blackjack, they would remain silent no longer.

"This motion is not made lightly," the ACLU told Justice Rehnquist, "but only after careful consideration by counsel and their colleagues in full knowledge of its unprecedented nature." The only precedent the ACLU could cite for such an action by a party was that unhappy episode in 1945 when the losing party in a celebrated miners' wage dispute had called for a rehearing on the ground that Justice Black, whose law partner of two decades earlier had argued for the labor union, should not have participated. The Court rejected this motion, however, with a most unusual separate concurrence by Justice Robert H. Jackson, joined by Justice Felix Frankfurter, pointing out that a justice's colleagues lacked power to judge the propriety of his action. Two years later, in a bitter open letter, Justice Jackson made clear that he indeed disapproved of Justice Black's role in the case. (Current canons support Justice Black and call for disqualification only where the case was in the law firm when the jurist and lawyer were partners.) That regrettable precedent did not augur well for the ACLU or for the Court's ability to handle the new motion dispassionately.

Accompanying the motion asking Justice Rehnquist to step aside was a petition for rehearing addressed to the entire Court.

The petition pointed to five separate instances in which the ACLU claimed that the five-member majority had accepted as though proven critical facts that underlay the decision, including the unproven assertion that the government had destroyed key surveillance records whose existence had been part of the complaint. In addition, the petition contended, the majority opinion had ignored numerous assertions of fact by the plaintiffs that, under the previously mentioned pleading rules governing motions to dismiss, must be accepted by the courts. It was needless to add that none of these alleged errors could have been committed by the Court if there had been no majority, since the consequences of a four to four tie vote are an affirmance of the lower court's judgment, which was that the case should go to trial rather than be dismissed, and no written opinion of any kind. The petition seemed correct in all respects and was most temperately worded. There was no opportunity for the government to dispute these points since the Supreme Court's rules do not call for an answer to a rehearing request unless the Court is considering granting it.

The motion to recuse Justice Rehnquist was based in part on the same federal disqualification statute, Section 455 of Title 28 of the U.S. Code that had been debated during the Haynsworth fight: "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit. . . ."

The second prong of the ACLU motion, more telling as a matter of policy though not based on any yet-recognized law, was the new ABA Code of Judicial Conduct. The code had been published in final draft form and was then scheduled for final ABA approval at the summer convention. Approval took place on schedule and the code was ABA policy by the time the Supreme Court convened again in the fall.

The motion said Rehnquist had been a self-styled Justice Department "spokesman" on the broad question of the constitutionality of surveillance and had appeared twice as a witness before Ervin's subcommittee. On one occasion the witness said he did not agree that "there are any serious constitutional problems with respect to collecting data on or keeping under surveillance persons who are merely exercising their rights of peaceful assembly or petition to redress a grievance." The witness did not limit himself to such generalities, the petition continued, but instead, "the concrete factual setting which he chose to discuss was the surveillance of civilians by the United States Army as depicted in the pleadings and the District Court decision in *Tatum v. Laird*, the very lawsuit" he voted on as a justice. A second statement had been even more pointed as Assistant Attorney General Rehnquist told Ervin:

> My point of disagreement with you is to say whether in the case of *Tatum v. Laird* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.

Besides speaking publicly in the same vein, Rehnquist also complied with a request from Senator Roman L. Hruska, Republican of Nebraska, for a legal memorandum supporting his constitutional thesis. The memorandum denied that there had been any interruption in robust debate as a result of the program of surveillance. In addition, Rehnquist during the hearings had been the government's custodian of large amounts of computerized evidence that the ACLU had been trying to get.

As for the new ABA code, the motion emphasized the broad admonitions of canon 2 that a judge "should avoid impropriety and the appearance of impropriety in all his activities" and canon 3C requiring disqualification when "his impartiality might reasonably be questioned." The ACLU said it was by no means questioning the good faith of Rehnquist's pre-judicial expression of views. "Indeed, it was precisely because of the clarity and finality of his testimonial views and the intimacy of his knowledge of the evidentiary facts at issue in this case that the respondents [the *Tatum* plaintiffs] were convinced that Mr. Justice Rehnquist would not participate in the Court's deliberation and decision. . . ."

The disqualification statute, strictly construed, was indeed severe, the ACLU admitted, but it argued that, in the language of an important 1955 Supreme Court decision, it "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' " There was no need to get into the question of actual bias, the ACLU said, when the judge has merely the normal concern about a case he had started before going on the bench. Citing a decision disqualifying then federal trial judge G. Harrold Carswell from a case that had been handled in his office when he had been United States attorney, the ACLU described it as "the interest that any lawyer has in pushing his case to a successful conclusion." This was a broad definition of the term "case" suggested by the fact that the Ervin hearings and the *Tatum* lawsuit were parallel proceedings going on in different forums.

Under the circumstances, said the ACLU,

> Mr. Justice Rehnquist's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department in Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims.

The answer came from the Court and the justice on October 10, 1972, the first decision day of the new term: "Motion to withdraw opinion of this Court denied. Motion to recuse, *nunc pro tunc*, presented to Mr. Justice Rehnquist, by him denied." There followed a sixteen-page memorandum by the justice that was as unusual for its content as it was unprecedented in law.

First the memorandum disposed of the ABA code as a separate and distinct basis for decision on the motion. "Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute, there is no occasion for me to give them separate consideration," Justice Rehnquist said. This was a startling statement in light of the universally acknowledged fact that the new canons set a much stricter disqualification standard than the existing federal statute. As discussed in the previous chapter, the new canons applied the "appearance of justice" test that would disqualify a judge in a doubtful case in place of the "duty to sit" concept that federal judges had evolved so that they would sit in the doubtful cases. For his legal authority in support of this remarkable conclusion, the justice cited none other than the 1969 report of the Senate Judiciary Committee majority supporting the Haynsworth nomination, which argued that the old canons then in effect should be read to harmonize with the federal statute in judging that nominee's ethical conduct. That this was dubious authority indeed was underscored by Rehnquist's own confirmation hearing testimony, quoted earlier in this chapter, that the full Senate's vote against Judge Haynsworth, which had of course *rejected* the Judiciary Committee's views, inclined him, in applying the federal disqualification law, "to the extent there is no conflict between them and the canons of judicial ethics, to try to follow that sort of stricter standards that I think the Senate, by its vote, indicated should prevail."

Having reduced his problem to the dimensions of the less restrictive federal law, Justice Rehnquist proceeded to take the narrowest possible view of the word "case." Said he: "I never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in this Court in the government's conduct of the case of *Laird v. Tatum.*" He added, "Since I have neither been of counsel nor have I been a material witness in *Laird v. Tatum*, these provisions are not applicable. . . . I did not have even an advisory role in the conduct of the case of *Laird v. Tatum*. . . ."

Turning to the statements made before the Ervin subcommittee, Rehnquist said there were two. One, in his prepared statement, was simply that the government had retained one printout from the army's computer for inspection by the court in the *Tatum* case. Justice Rehnquist quoted this statement in his memorandum. He did not quote the second statement, however, the one set out in full on page 217. If he had, he might have faced the disqualification issue more squarely. This was the remark of witness Rehnquist disagreeing with Chairman Ervin over whether "an action will lie" in the case of *Tatum v. Laird*. Justice Rehnquist called this exchange "a discussion of the applicable law." But this, as all lawyers will recognize and most lawyers will freely state, is not a mere discussion of the "applicable law." It is a statement of how the law should be applied to a particular case. Time after time throughout the memorandum's sixteen pages, Justice Rehnquist repeated that characterization of his Senate testimony. Time after time he refused to treat the ACLU charge that he had commented on the merits—or, as witness Rehnquist had testified, lack of merits—of the lawsuit itself.

For example, the memorandum said that since most justices come to the bench no earlier than their middle years, "It would be not merely unusual, but extraordinary, if they had not at least given opinions *as to constitutional issues* [emphasis supplied] in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." The ACLU had not contested this truism.

Later in the memorandum the justice said that since no jurist starts from dead center on such issues, "it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding *of the meaning of some particular provision of the Constitution.*" [Emphasis supplied.] This, too, was not contested as a general proposition.

Although the ACLU pitched that part of its argument based on the federal statute on the so-called mandatory clauses of section 455—those that require disqualification if a judge has a substantial interest, has been of counsel, or is or has been a material witness—Justice Rehnquist devoted most of his memorandum to the so-called discretionary clause—"so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit"—on which the ACLU apparently had deemed it useless to rely. Much of his argument here had to do with the historic practices of different justices, some of whom sat in close cases. He noted that Justice Black had been criticized for sitting in Fair Labor Standards Act cases but not, to Rehnquist's knowledge, because he had been the legislation's floor manager while a senator from Alabama. Frankfurter wrote about the evils of the antilabor injunction and helped sire the 1933 federal law against it, then wrote the Court's opinion in a major 1941 case involving the law. Justice Jackson voted in a 1950 case based on an issue he had decided as attorney general before he joined the Court in 1941. Charles Evans Hughes criticized a decision in a law lecture a few years before becoming chief justice and nine years later wrote the Court's opinion in another case overruling the decision. Justice Harlan felt free in 1961 to join with the Court in rejecting a view he had expressed while a judge on the Second U.S. Circuit Court of Appeals. And Justice Holmes sat on no fewer than eight cases in which he had taken part while chief justice of the Massachusetts Supreme Judicial Court (this at a time when the federal law on such matters, enacted in 1891, did not apply to members of the U.S. Supreme Court). But all of these examples, except possibly the Holmes cases, were irrelevant, since they did not involve a justice sitting in a *case* about which he had already publicly commented while it was pending.

Justice Rehnquist's final reason for sitting was based on supposed problems in judicial administration posed by an equally divided Court and the doctrine, developed in several federal circuits but repudiated in the new ABA code and perhaps by the Senate's Haynsworth vote, that a jurist had a "duty to sit" unless clearly disqualified. He deemed it undesirable that a case heard by the Supreme Court should be nondecided by a deadlocked vote. It should not be left "unsettled" in that fashion. This concern, which is a valid concern as a general proposition, scarcely applied to the *Tatum* case, which might have been quite effectively resolved by a four to four affirmance. A tie vote would have sustained the court of appeals and required a trial on the complaint. How much preferable such a result, rather than having it decided by the vote of a disqualified justice, fresh from the ranks of the Nixon administration where he had made something of a cause out of defending the challenged surveillance practice from legal attack.

Justice Rehnquist said the "duty to sit" doctrine impelled him to sit even though "I would certainly concede that fair-minded judges might disagree about the matter." In addition to the doctrine's abandonment in the new ABA code, another code provision seemed to apply with special relevance to his situation: the section that said a judge formerly employed by a governmental agency "should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association." That test would seem to call for disqualification under the justice's own concession that his judgment might indeed reasonably be questioned. But of course Justice Rehnquist had already rejected any argument based on the new code since he saw them as not "materially different" from the standards he was applying.

Admittedly, some close questions, intriguing to lawyers and scholars, may arise when a judge sits in a case with a trace of past involvement. Often the proper response is a matter of degree. For example, Justice Thurgood Marshall's participation in civil rights cases sometimes stirs discussion, despite the fact that jurists of the white race decided civil rights cases without challenge for generations. Justice Marshall has recused himself when the National Association for the Advancement of Colored People is a party in a case before him but understandably does not sit out every new case brought by lawyers for the NAACP Legal Defense Fund, Inc., where he served as director-counsel before 1962. Justice Byron R. White repeatedly declines to sit in some criminal cases, apparently because they involve a law he lobbied through Congress as deputy attorney general under Attorney General Robert F. Kennedy. Others on the Supreme Court constantly confront ethical problems with subtle features. But there was nothing subtle about the *Tatum* case and Justice Rehnquist's relationship to it. Try as he might to restate the matter, Rehnquist judged the rights of parties after giving his view that one of the parties had no rights and after working to defeat that party's claim to rights.

Even when the Supreme Court has been taken over and reconstituted by a series of new appointments, justice is not administered by lining up the Court's members and simply polling them on controversial questions. The Court sits to decide cases, and unless its work is done judicially and judiciously it is not a court, it is only supreme, and that not for long if its credibility erodes. The civil libertarians who were so heavily engaged in the *Tatum* case could not expect to win on the issue in the long run, given the High Court's makeup, but they had a right to expect that they would not lose the issue except in a case decided by disinterested justices.

Melvin R. LAIRD, Secretary of Defense, et al., Petitioners,

v.

Arlo TATUM et al.

No. 71-288.

Oct. 10, 1972.

Memorandum of Mr. Justice REHNQUIST.

Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.[1]

Respondents contend that because of testimony which I gave on behalf of the Department of Justice before the Subcommittee on Constitutional Rights of the Judiciary Committee of the United States Senate at its hearings on "Federal Data Banks, Computers and the Bill of Rights," and because of other statements I made in speeches related to this general subject, I should have disqualified myself from participating in the Court's consideration or decision of this case. The governing statute is 28 U.S.C. § 455 which provides:

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[1] In a motion of this kind, there is not apt to be anything akin to the "record" which supplies the factual basis for adjudication in most litigated matters. The judge will presumably know more about the factual background of his involvement in matters which form the basis of the motion than do the movants, but with the passage of any time at all his recollection will fade except to the extent it is refreshed by transcripts such as those available here. If the motion before me turned only on disputed factual inferences, no purpose would be served by my detailing my own recollection of the relevant facts. Since, however, the main thrust of respondents' motion is based on what seems to me an incorrect interpretation of the applicable statute, I believe that this is the exceptional case where an opinion is warranted.

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Respondents also cite various draft provisions of Standards of Judicial Conduct prepared by a distinguished committee of the American Bar Association, and adopted by that body at its recent annual meeting. Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute, there is no occasion for me to give them separate consideration.[2]

Respondents in their motions summarize their factual contentions as follows:

> "Under the circumstances of the instant case, Mr. Justice Rehnquist's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department ~~and~~/in Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims."

Respondents are substantially correct in characterizing my appearance before the Ervin Subcommittee as an "expert witness for the Justice Department" on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.

Respondents' reference, however, to my "intimate knowledge of the evidence underlying the respondents' allegations" seems to me to make a great deal of very little. When one of the Cabinet departments of the Executive Branch is requested to supply a witness for the congressional committee hearing devoted to a particular subject, it is generally confronted with a minor dilemma. If it is to send a witness with personal knowledge of every phase of the inquiry, there will be not one spokesman but a dozen. If it is to send one spokesman to testify as to the Department's position with respect to the matter under inquiry, that spokesman will frequently be called upon to deal not only with matters within his own particular bailiwick in the Department, but with those in other areas of the Department with respect to which his familiarity may be slight. I commented on this fact in my testimony before Senator Ervin's Subcommittee:

> "As you might imagine, the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge in every field. So I can simply give you my understanding . . . ." Hearings, p. 619.

There is one reference to the case of Tatum v. Laird in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a colloquy with Senator Ervin. The former appears as follows in the reported hearings:

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[2] See Executive Report No. 91-02, 91st Cong., 1st Sess., Nomination of Clement F. Haynsworth, Jr., pp. 10–11.

> "However, in connection with the case of Tatum v. Laird, now pending in the U. S. Court of Appeals for the District of Columbia Circuit, one print-out from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed."

The second comment respecting the case was in a discussion of the applicable law with Senator Ervin, the chairman of the Subcommittee, during my second appearance.

My recollection is that the first time I learned of the existence of the case of Laird v. Tatum, other than having probably seen press accounts of it, was at the time I was preparing to testify as a witness before the Subcommittee in March 1971. I believe the case was then being appealed to the Court of Appeals by respondents. The Office of the Deputy Attorney General, which is customarily responsible for collecting material from the various divisions to be used in preparing the Department's statement, advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army Data Bank, and it was incorporated into the prepared statement which I read to the Subcommittee. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print-out. Since the print-out had been lodged with the Justice Department by the Department of the Army, I later authorized its transmittal to the staff of the subcommittee at the request of the latter.

At the request of Senator Hruska, one of the members of the Subcommittee, I supervised the preparation of a memorandum of law which the record of the hearings indicates was filed on September 20, 1971. Respondents refer to it in their petition, but no copy is attached, and the hearing records do not contain a copy. I would expect such a memorandum to have commented on the decision of the Court of Appeals in Laird v. Tatum, treating it along with other applicable precedents in attempting to state what the Department thought the law to be in this general area.

[1] Finally, I never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in this Court, in the government's conduct of the case of Laird v. Tatum.

Respondents in their motion do not explicitly relate their factual contentions to the applicable provisions of 28 U.S.C. § 455. The so-called "mandatory" provisions of that section require disqualification of a Justice or judge "in any case in which he has a substantial interest, has been of counsel, [or] has been a material witness . . . ."

[2] Since I have neither been of counsel nor have I been a material witness in Laird v. Tatum, these provisions are not applicable. Respondents refer to a memorandum prepared in the Office of Legal Counsel for the benefit of Mr. Justice White shortly before he came on the Court, relating to disqualification. I reviewed it at the time of my confirmation hearings and found myself in substantial agreement with it. Its principal thrust is that a Justice Department official is disqualified if he either signs a pleading or brief or "if he actively participated in any case even though he did not sign a pleading or brief." I agree. In both United States v. United States District Court for Eastern District of Michigan, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), for which I was not officially responsible in the Department but with respect to which I assisted in drafting the brief, and in S & E Contractors v. United States, 406 U.S. 1, 92 S.Ct. 1411, 31 L.Ed.2d 658 (1972), in which I had only an advisory role which terminated immediately prior to the commencement of the litigation, I disqualified myself. Since I did not have even an advisory role in the conduct of the case of Laird v. Tatum, the application of such a rule

would not require or authorize disqualification here.

This leaves remaining the so-called discretionary portion of the section, requiring disqualification where the judge "is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." The interpretation and application of this section by the various Justices who have sat on this Court seem to have varied widely. The leading commentator on the subject is John P. Frank, whose two articles, Disqualification of Judges, 56 Yale Law Journal 605 (1947), and Disqualification of Judges: In Support of the Bayh Bill, 35 Law and Contemporary Problems 43 (1970), contain the principal commentary on the subject. For a Justice of this Court who has come from the Justice Department, Mr. Frank explains disqualification practices as follows:

> "Other relationships between the Court and the Department of Justice, however, might well be different. The Department's problem is special because it is the largest law office in the world and has cases by the hundreds of thousands and lawyers by the thousands. For the most part, the relationship of the Attorney General to most of those matters is purely formal. As between the Assistant Attorneys General for the various departmental divisions, there is almost no connection." Frank, *supra*, 35 Law & Contemporary Problems, at 47.

Indeed, different Justices who have come from the Department of Justice have treated the same or very similar situations differently. In Schneiderman v. United States, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943), a case brought and tried during the time Mr. Justice Murphy was Attorney General, but defended on appeal during the time that Mr. Justice Jackson was Attorney General, the latter disqualified himself but the former did not. 320 U.S., at 207, 63 S.Ct., at 1375.

I have no hesitation in concluding that my total lack of connection while in the Department of Justice with the defense of the case of Laird v. Tatum does not suggest discretionary disqualification here because of my previous relationship with the Justice Department.

[3] However, respondents also contend that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance. While no provision of the statute sets out such a provision for disqualification in so many words, it could conceivably be embraced within the general language of the discretionary clause. Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law is or ought to be should later sit as a judge in a case raising that particular question. The present disqualification statute applying to Justices of the Supreme Court has been on the books only since 1948, but its predecessor, applying by its terms only to district court judges, was enacted in 1911. Chief Justice Stone, testifying before the Judiciary Committee in 1943, stated:

> "And it has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it, or a circuit court of appeals judge, it was our manifest duty to take the same position." Hearings Before Committee on the Judiciary on H.R. 2808, 78th Cong., 1st Sess. (1943), quoted in Frank, *supra*, 56 Yale Law Journal, at 612.

My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

Mr. Justice Black while in the Senate was one of the principal authors of the

Fair Labor Standards Act; indeed, it is cited in the 1970 edition of the United States Code as the "Black-Connery Fair Labor Standards Act." Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. See S.Rep.No.884, 75th Cong., 1st Sess. (1937). Nonetheless, he sat in the case which upheld the constitutionality of that Act, United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941), and in later cases construing it, including Jewel Ridge Coal Corp. v. Local 6167, UMW, 325 U.S. 161, 65 S.Ct. 1063, 89 L.Ed. 1534 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly criticized him for failing to do so.[3] But to my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Justice Frankfurther had, prior to coming to this Court, written extensively in the field of labor law. "The Labor Injunction" which he and Nathan Green co-authored was considered a classical critique of the abuses by the federal courts of their equitable jursdiction in the area of labor relations. Professor Sanford H. Kadish has stated:

> "The book was in no sense a disinterested inquiry. Its authors' commitment to the judgment that the labor injunction should be neutralized as a legal weapon against unions gives the book its energy and direction. It is, then, a brief, even a 'downright brief' as a critical reviewer would have it." Kadish, Labor and the Law, in Felix Frankfurter The Judge 165 (W. Mendelson ed. 1964).

Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101–115. This Act was designed by its proponents to correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet in addition to sitting in one of the leading cases interpreting the scope of the Act, United States v. Hutcheson, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941), Justice Frankfurter wrote the Court's opinion.

Justice Jackson in McGrath v. Kristensen, 340 U.S. 162, 71 S.Ct. 224, 95 L. Ed. 173 (1950), participated in a case raising exactly the same issue which he had decided as Attorney General (in a way opposite to that in which the Court decided it). 340 U.S., at 176, 71 S.Ct., at 232. Mr. Frank notes that Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled The Supreme Court of the United States (Columbia University Press, 1928). In a chapter entitled "Liberty, Property, and Social Justice" he discussed at some length the doctrine expounded in the case of Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1922). I think that one would be warranted in saying that he implied some reservations about the holding of that case. See pp. 205, 209–211. Nine years later, Chief Justice Hughes authored the Court's opinion in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 573, 81 L.Ed. 703 (1937), in which a closely divided Court overruled *Adkins*. I have never heard any suggestion that because of his discussion of the subject in his book he should have recused himself.

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[3] See denial of petition for rehearing in Jewel Ridge Coal Corp. v. Local 6167, UMW, 325 U.S. 897, 65 S.Ct. 1550, 89 L.Ed. 2007 (1945) (Jackson, J., concurring).

Mr. Frank summarizes his view of Supreme Court practice as to disqualification in the following words:

> "In short, Supreme Court Justices disqualify when they have a dollar interest; when they are related to a party and more recently, when they are related to counsel; and when the particular matter was in one of their former law offices during their association; or, when in the government, they dealt with the precise matter ~~and particularly with the precise case~~; otherwise, generally no." ~~Frank, supra, 35 Law &~~ Contemporary Problems, at 50.

Not only is the sort of public statement disqualification upon which respondents rely not covered by the terms of the applicable statute, then, but it does not appear to me to be supported by the practice of previous Justices of this Court. Since there is little controlling authority on the subject, and since under the existing practice of the Court disqualification has been a matter of individual decision, I suppose that one who felt very strongly that public statement disqualification is a highly desirable thing might find a way to read it into the discretionary portion of the statute by implication. I find little to commend the concept on its merits, however, and I am, therefore, not disposed to construe the statutory language to embrace it.

I do not doubt that a litigant in the position of respondents would much prefer to argue his case before a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Kristensen would have preferred not to argue before Mr. Justice Jackson;[4] that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Chief Justice Hughes.

The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.

Mr. Justice Douglas' statement about federal district judges in his dissenting opinion in Chandler v. Judicial Council, 398 U.S. 74, 137, 90 S.Ct. 1648, 1681, 26 L.Ed.2d 100 (1970), strikes me as being equally true of the Justices of this Court:

> "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community."

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

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[4] The fact that Mr. Justice Jackson reversed his earlier opinion after sitting in Kristensen does not seem to me to bear on the disqualification issue. A judge will usually be required to make any decision as to disqualification before reaching any determination as to how he will vote if he does sit.

Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policy making divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue which later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. See, *e. g.*, the opinion of Mr. Justice Harlan, joining in Lewis v. Manufacturers National Bank, 364 U.S. 603, 610, 81 S.Ct. 347, 350, 5 L.Ed.2d 323 (1961). Indeed, there is weighty authority for this proposition even when the cases are the same. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court. See Worcester v. Worcester Consolidated Street R. Co., 196 U.S. 539, 25 S.Ct. 327, 49 L.Ed. 591 (1905), reviewing, 182 Mass. 49, 64 N.E. 581 (1902); Dunbar v. Dunbar, 190 U.S. 340, 23 S.Ct. 757, 47 L.Ed. 1084 (1903), reviewing, 180 Mass. 170, 62 N.E. 248 (1901); Glidden v. Harrington, 189 U.S. 255, 23 S.Ct. 574, 47 L.Ed. 798 (1903), reviewing, 179 Mass. 486, 61 N.E. 54 (1901); and Williams v. Parker, 188 U.S. 491, 23 S.Ct. 440, 47 L.Ed. 559 (1903), reviewing, 174 Mass. 476, 55 N.E. 77 (1899).

Mr. Frank sums the matter up this way:

> "Supreme Court Justices are strong minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way." Frank, *supra*, 35 Law & Contemporary Problems, at 48.

The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance which should not by itself form a basis for disqualification.[5]

Based upon the foregoing analysis, I conclude that the applicable statute does not warrant my disqualification in this case. Having so said, I would certainly concede that fair minded judges might disagree about the matter. If all doubts were to be resolved in favor of disqualification, it may be that I should disqualify myself simply because I do regard the question as a fairly debatable one, even though upon analysis I would resolve it in favor of sitting.

[4, 5] Here again, one's course of action may well depend upon the view he

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[5] In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

takes of the process of disqualification. Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to *sit where not disqualified* which is equally as strong as the duty to *not sit where disqualified.* Edwards v. United States, 334 F.2d 360, 362 (CA5 1964); Tynan v. United States, 126 U.S.App.D.C. 206, 376 F.2d 761 (1967); In re Union Leader Corporation, 292 F.2d 381 (CA1 1961); Wolfson v. Palmieri, 396 F.2d 121 (CA2 1968); Simmons v. United States, 302 F.2d 71 (CA3 1962); United States v. Hoffa, 382 F.2d 856 (CA6 1967); Tucker v. Kerner, 186 F.2d 79 (CA7 1950); Walker v. Bishop, 408 F.2d 1378 (CA8 1969). These cases dealt with disqualification on the part of judges of the district courts and of the courts of appeals. I think that the policy in favor of the "equal duty" concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. See, *e. g.*, Tinker v. Des Moines etc. School District, D.C., 258 F.Supp. 971, affirmed by an equally divided court, 383 F.2d 988 (CA8 1967), certiorari granted and judgment reversed, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not "bending over backwards" in order to deem one's self disqualified.

The prospect of affirmance by an equally divided Court, unsatisfactory enough in a single case, presents even more serious problems where companion cases reaching opposite results are heard together here. During the six months in which I have sat as a Justice of this Court, there were at least three such instances.[6] Since one of the stated reasons for granting certiorari is to resolve a conflict among other federal courts or state courts, the frequency of such instance is not surprising. Yet affirmance of each of such conflicting results by an equally divided Court would lay down "one rule in Athens, and another rule in Rome" with a vengeance. And since the notion of "public statement" disqualification which I understand respondents to advance appears to have no ascertainable time limit, it is questionable when or if such an unsettled state of the law could be resolved.

[6] The oath prescribed by 28 U.S.C. § 453 which is taken by each person upon becoming a member of the federal judiciary requires that he "administer justice without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . agreeably to the Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former Justices of

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[6] Branzburg v. Hayes, In re Pappas, and United States v. Caldwell, — U.S. —, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). Gelbard v. United States and United States v. Egan, — U.S. —, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972). Evansville-Vanderburgh Airport Authority District v. Delta Airlines Inc. and Northeast Airlines Inc. v. New Hampshire Aeronautics Commission, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972).

this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law. That being the case, it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution.

Based on the foregoing considerations, I conclude that respondents' motion that I disqualify myself in this case should be, and it hereby is denied.[7]

Motion denied.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Just one comment. Why don't we clear this up. This is the biggest "red herring" I have seen in the whole hearing. There are a number of them, is this business of these titles.

Justice Rehnquist did not know about it. He found out about it through this hearing. It is good that he has. Under *Shelly* v. *Kramer*, everybody who understands constitutional law knows that these provisions are unconstitutional and may not be enforced by the courts in this country.

I wonder if I could ask my two colleagues from Arizona and from Vermont if they would just ask the public officials to strip those deeds of those provisions, and let us get rid of them. Or I suppose you could go through a quit-claim process and just get them stripped off. As I understand it, Justice Rehnquist has suggested he is going to take them off.

Senator KENNEDY. Mr. Chairman——

The CHAIRMAN. Just a minute. Let Senator Hatch get through.

Senator HATCH. Justice Rehnquist said he did not know about them. He is going to take them off. I think it is ridiculous to make a big brouhaha about something this ridiculous.

The CHAIRMAN. Well, they are unenforceable, anyway. They do not amount to anything. They will all go out.

Senator HATCH. It is ridiculous.

Senator METZENBAUM. I do not know if it is ridiculous.

Senator HATCH. Of course it is ridiculous. You know it is ridiculous, I know it is ridiculous. It is not enforceable.

Senator METZENBAUM. No, I do not know it is ridiculous at all.

Senator KENNEDY. If the Senator would——

The CHAIRMAN. Senator Hatch has the floor.

Senator HATCH. You are jumping on every little possible detail. Let us be honest about it. I do not know a lawyer alive who goes through a house closing who reads every one of those documents if he has another lawyer doing it for him. I never have; I do not think you have.

Senator KENNEDY. Would the Senator just yield on that point?

Senator HATCH. I would be happy to.

Senator KENNEDY. I think part of the question is, this nominee was an official of the Justice Department, the Justice Department of the United States——

Senator HATCH. Well, what has that got to do with it?

Senator KENNEDY [continuing]. In 1969 when he transferred a property that had that kind of a restrictive provision in it. And I think that is completely——

Senator HATCH. And 2 years before, Vermont enacted a statute saying that is not possible to do.

Senator KENNEDY. That is completely—we are not talking about a person who transfers a home who has not that particular responsibility. This is a member of the legal counsel of the Justice Department.

Senator DECONCINI. If the Senator would yield——

The CHAIRMAN. I might make this statement——

Senator HATCH. Would you do that for us, Senator DeConcini. I would be happy to yield.

The **Chairman**. I might make this statement. We have had numbers of nominees here that have been involved in this way.

Senator **Hatch**. This is ridiculous.

The **Chairman**. They bought property and did not realize it had certain restrictions. But whether it had restrictions or not, they are unenforceable, and they do not amount to anything, and that has all been acknowledged, so why waste more time?

The distinguished Senator from Vermont.

Senator **Hatch**. The Senator from Arizona asked me to yield.

The **Chairman**. Oh. I thought you were through.

Senator **Hatch**. No, I was not.

Senator **DeConcini**. Would the Senator from Utah yield?

Senator **Hatch**. I would be happy to yield.

Senator **DeConcini**. I just wanted to pose a question. I wonder how many of us on this committee could say that we have never owned a piece of property, either in trust or in escrow or in our names, without being completely familiar with the provisions of the deed. Maybe the Senator from Ohio can say that.

Senator **Metzenbaum**. That is right. I could not buy my home, according to the seller.

Senator **DeConcini**. I would be glad to yield to him. I just made reference to the Senator; I did not yield.

It just seems to me that perhaps we should ask the FBI to look at all of our property——

Senator **Hatch**. I would like that.

Senator **DeConcini**. Of everybody here, and those properties——

Senator **Hatch**. I do not know what is in my deed.

Senator **DeConcini** [continuing]. If the Senator would just let me finish——

The **Chairman**. Just a minute. The Senator from Arizona has the floor.

Senator **DeConcini** [continuing]. That are held in trust for our beneficial interests, to see whether or not there are any such restrictions that might have been put there years ago, because I suspect that we would find such restrictions. And if we did, that would determine absolutely nothing as to the character of anybody on this committee, or to their insensitivity, in my judgment.

Senator **Kennedy**. Would the Senator yield on this point?

Senator **Hatch**. I would be happy to yield to my esteemed colleague.

Senator **Kennedy**. I have no objection to the request. I think the point that has to be made is the real question of the sensitivity of this nominee on the issue of civil rights.

That is a major issue concerning this nomination.

Senator **Hatch**. It may be in your mind, Senator.

Senator **Kennedy**. None of us are being nominated for the Supreme Court. The question with this nominee is the sensitivity on the issues of civil rights. And I think that these are not matters which are inconsequential for us or for the members of the Senate to draw some——

Senator **Hatch**. Mr. Chairman, if I could just finish on my time, Mr. Rehnquist, this matter is blown way out of proportion. It is difficult to see you getting raked over the coals about events that happened 34 or 35 years ago. I could hardly believe my eyes when I watched the headline news this morning on television. It was as though it was really something. These types of covenants are vestiges of a very bad past. Everybody knows they are illegal. They have been illegal since *Shelly* v. *Kramer*. There is no legal reason to remove them. However, we all wish they were gone when we find out about them.

You have made it clear that now that you have found out about it, you want to purge any deeds that you and your wife hold with this type of language.

I suspect that there are a lot of sincere, decent, wonderful people in this country who are totally against discrimination. However, they probably have these covenants in their deeds because they have not read them.

Now, to blow this out of proportion as though this is something this important, with a man who has sat on the Supreme Court for 15 years, who has an excellent record in all respects and who every member of the present Supreme Court looks forward to serving with as Chief Justice, is ridiculous.

That is what you have to go through. Senator Simpson summed it up in his opening remarks.

The CHAIRMAN. The distinguished Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman.

Justice Rehnquist, to follow up a line of questioning that Senator DeConcini had earlier, do you—and I realize this is a subjective question; you have been the lone dissenter in many, many cases—do you feel a greater independence in dissenting if you are the lone dissenter than if you were the swing vote in a 5-4 decision?

Justice REHNQUIST. Oh, very much so, Senator. If you are the swing vote in putting together a five-judge majority, you have some leverage, obviously, but so does everyone else. The opinion, if there is division among the five, is apt to be a composite; whereas if you are a sole dissenter, you are writing only for yourself.

Senator LEAHY. And do you find if you are one who may well be the swing vote or the person writing the majority opinion, especially in a 5-4 decision, that some of the expressions or—I hate to use the word "extreme" position—some of the very strong positions that you might take as a lone dissenter are no longer available to you?

I am not trying to put words in your mouth. I am just wondering how that process goes.

Justice REHNQUIST. There is no doubt that when a Justice is assigned an opinion to write where the majority has only five people in it, the Justice cannot just write the ticket the way the Justice himself sees it. You have to accommodate the views of the four other people whom you hope to join your opinion. So, there is often compromise, because it is unlikely that five people are going to see any important issue just exactly alike. And, on the other hand, as you point out, when you are writing for yourself, there are not those constraints on you.

Senator LEAHY. Mr. Chairman, while the Senator from Utah is still here—if I might have the Senator from Utah's attention just for a moment—well, even without the Senator from Utah's attention, I will continue.

The **Chairman**. The distinguished Senator from Utah, he wanted you to hear something if you would care to.

Senator **Leahy**. I know my good friend from Utah would like to hear it. [Laughter.]

I know the Senator from Vermont has expressed the opinion that the question of restrictive deeds has been somehow blown out of proportion and is a "red herring." I would remind the Senator from Utah that I think about 90 percent of my time yesterday was talking about the *Laird* v. *Tatum* case and involvement of it.

Senator **Hatch**. I agree with that.

Senator **Leahy**. I do feel, however, with this issue, we should have at least raised it, and I do not think Justice Rehnquist would have expected it to not be raised. I would——

Senator **Hatch**. Would the Senator yield on that point?

Senator **Leahy** [continuing]. If I could just finish, I would be happy to—I would note that under Vermont law, it is indeed null and void—and as the only member, I think, of the Vermont Bar here on this panel, I can state that with a great deal of certitude—it would be certainly null and void under any Federal law.

And I was asked this morning by some in the press how I would determine whether you were indeed going to have it removed. I said it is very simple: You said you would. And I accept that assurance completely. I do not need any proof or followup. You have said that you will have it removed. There is a fairly simple procedure using a strong deed. I accept your assurances completely, and I think that that—to save all the telephone calls that I might be receiving in my office as we follow that. You said it; I believe it.

I would also point out that there has been nothing in my review of your statements—and I have done a very exhaustive review of your statements, cases, and your background—I find nothing in your statements or your background to suggest any anti-Semitism in that background. This was a covenant added to your deed. It was brought forward from an earlier deed. The fact that that covenant is in there, I find regrettable that it is, and I am glad you are going to remove it.

But its inclusion in no way suggests to me any kind of an anti-Semitic background. I note that just so that following the statements from the Senator from Utah, I would not want any of my questions to be misinterpreted. But I would also say that as I go through the report and see obviously a Vermont deed, and seeing something that I have never seen in my years of practice in Vermont, that probably, it should be asked.

Senator **Hatch**. Would the Senator yield on that point?

The **Chairman**. Senator Hatch asked you if you would yield.

Senator **Leahy**. Of course.

Senator **Hatch**. I would like to just compliment my colleague from Vermont. I find no problem with raising the issue. What I find problems with is blowing it out of proportion. I know the distinguished Senator from Vermont did not. The Justice has spoken very carefully and accurately on it. The distinguished Senator from Vermont has spoken carefully, accurately and compassionately on this issue. And I appreciate it. It is time to put it to bed. To make this issue the No. 1 story on major network news this morning was reprehensible, but that is what happened. It has been blown out of proportion. Those who made it the No. 1 news story know the law too.

I am suggesting that if there are good points, they should be brought up. However, they should not be blown out of proportion like this. I want to thank my colleague from Vermont for his fair comments.

The CHAIRMAN. The Senator from Vermont may continue.

Senator LEAHY. I think Justice Rehnquist wanted to say something, and we cut him off.

Justice REHNQUIST. Yes; I did. I completely agree with your characterization of me, and the statement that I plan to do something about it is correct, and I will see that it is done.

Senator LEAHY. Thank you.

I have no further questions, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. Mr. Chairman, the Senator from Pennsylvania has asked if I would yield.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTER. Is that any problem for you, Senator Mathias?

Senator MATHIAS. No problem as long as we do not fall too far down the ladder.

Senator SPECTER. I thank my distinguished colleague.

The CHAIRMAN. I want to make an announcement at this time. So, Senators come here and stay for hours, and then some other Senator who normally would have ranked him comes in and gets ahead. Hereafter, I am going to go right down the line, and if any Senator is not here, then he will have to wait until the end to question. It is not fair to other Senators who have been here for hours.

The distinguished Senator from Pennsylvania.

Senator KENNEDY. Mea culpa, mea culpa.

Senator SPECTER. Thank you very much, Mr. Chairman. I think I do fall within the category of Senators who have stayed here for hours. I thank the Chair.

The CHAIRMAN. I thank you for it.

Senator SPECTER. Mr. Justice Rehnquist, just one or two questions on the issue of the restrictive covenant, which does concern this Senator. When did you first find out about it?

Justice REHNQUIST. The last couple days.

Senator SPECTER. And have you had an opportunity to do anything about it in the interim since you found out about it?

Justice REHNQUIST. I frankly have not, Senator. I have been so busy with these hearings that I simply have not devoted myself to anything else.

Senator SPECTER. When would you anticipate that you will be able to have the matter corrected?

Justice REHNQUIST. I intend to write the lawyer in Vermont who handled the transaction for me today when the hearings are over, if they are over for me today.

Senator SPECTER. Mr. Justice Rehnquist, I want to pursue the question which I had asked you about yesterday, because I think it is a very fundamental one. We started with the case of *Marbury* v. *Madison*, which you testified you had no trouble adhering to, and that is the basic authority of the Supreme Court of the United States to interpret the Constitution and to hand down rulings which are binding on both the executive and legislative branches. And I then asked you about the question of whether that rule could be circumvented directly by a legislative enactment which would take jurisdiction from the court. And the area of concern illustratively that I posed was, could Congress legislate and say that the Supreme Court had no jurisdiction to decide cases involving freedom of speech, freedom of press, freedom of religion, taking those as the most fundamental of our rights under the first amendment.

And I do believe that it is an appropriate area of inquiry, and when my time expired, I said that I would review some of the authorities in the field; and I have found some of your own statements on the subject which support the position that I am asserting in asking the question, and I will reference them to you at this time.

There was a memorandum prepared in anticipation of the hearings of Justice O'Connor, prepared by Grover Reis, who was on the staff of Senator East, chief counsel on the Subcommittee on Courts. Mr. Reis had been assistant professor of law at the University of Texas, and then he went to work for Attorney General Meese at the Department of Justice, screening judges, and now, as I understand it, he is the chief judge of the United States-operated court system in American Samoa. And it is an extensive commentary, and I shall quote from only limited parts of it because of the limitations on time.

The basic outline is summarized by Professor Reis, or Judge Reis, as follows:

> The controversy over questioning at confirmation hearings stems from a tension between two incontrovertible propositions. First, the Senate has a duty to exercise the advice and consent function with the most careful consideration and the greatest possible knowledge of all factors that might bear on whether the nominee will be a good or bad Supreme Court Justice. Second, a Justice of the Supreme Court owes the litigants in each case his honest judgment on what the law is and such judgment would be compromised if the nominee were to promise his vote on a particular case or class of cases in an effort to facilitate his confirmation.

There are a great deal of other important matters which follow, but I am not going to go into it at this time; I may come back to it later if it is warranted.

Judge Reis then quotes from Professor Black, and then he quotes from you, Justice Rehnquist, on writings that you made in 1959, discussing the nomination of Justice Charles Whittaker.

> Mr. Rehnquist complained that the discussion had, "succeeded in adducing facts, (a) proceeds from a skunk-trapping in rural Kansas assisted him in obtaining his early education," referring to Justice Whittaker; "(b) that he was both fair and able in his decisions as a judge of the lower Federal courts, and (c) he was the first Missourian ever appointed to the Supreme court; (d) since he had been born in Kansas and now resided in Missouri, his nomination honored two States."

Judge Reis goes on to say:

> Mr. Rehnquist distinguished the Senate's duty in voting on the nomination of a judge of a lower Federal court, whose principal duty is to apply rules laid down by the Supreme Court and whose integrity, education and legal ability are the paramount factors in his qualifications from the confirmation of a Supreme Court Justice.

Then he continues to quote you:

The Supreme Court in interpreting the Constitution is the highest authority in the land; nor is the law of the Constitution just "there" waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the Constitution which have been most productive of the judicial lawmaking, the due process of law and equal protection of the law clauses, are about the vaguest and most general of any in the instrument.

The court in *Brown* v. *Board of Education* citation held in effect that the Framers of the 14th amendment left it to the court to decide whether due process and equal protection, what they meant. Whether or not the Framers thought this, it is sufficient for this discussion that the present court thinks the Framers thought it.

Given the state of things in March 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process? The only way for the Senate to learn of these views is to inquire of men on their way to the Supreme Court something of their views on these questions.

Now, I do intend to ask you some questions about due process of law and equal protection. But at this juncture, I want to make a sharp distinction between the interpretation of due process of law and equal protection, which is subject to certain vagaries, as you noted there, and the jurisdiction of the Court.

It seems to me that questions of jurisdiction are much more, infinitely more, fundamental than how you interpret due process or equal protection, because the Court cannot get to that question or those questions until the court decides it has the power to decide the case.

And it is in that context that I do press, for an answer on the issue of whether the Congress, in your view, has the authority to say the Supreme Court does not have jurisdiction on first amendment issues of freedom of speech, press and religion, because if the Congress has that authority, then it seems to me there is nothing left of *Marbury* v. *Madison*.

Justice REHNQUIST. Senator, you said yesterday that you thought Justice O'Connor in her hearings had answered a similar question. I still have considerable reservations about it, whether I ought to do it, but I am sure you are correct, if one of my colleagues has felt that that was proper, I certainly will resolve doubts and try to give you an answer.

The answer obviously is not one that comes with the benefit of reading briefs, hearing arguments, conferring. It is very much of a horseback opinion; it has to be in a situation like this.

And I think that it would be very hard to uphold a law which carved out certain provisions of the Constitution such as you are describing, the first amendment, and said the Court should have jurisdiction over everything except first amendment cases.

Senator LEAHY. Well, the statute could be enacted which would say the Court shall not have jurisdiction over first amendment cases involving freedom of speech, press, or religion. That is my area of concern, specifically stated. And I take it from your answer you think that the Congress would not have that authority.

Justice REHNQUIST. That is correct.

Senator SPECTER. Well, I am glad to hear you say that, Mr. Justice Rehnquist. When you make that statement with respect to the absence of Congress' power——

The CHAIRMAN. The Senator's time is up, but you can go ahead and ask and let it be answered, and then we will pass on.

Senator SPECTER. Well, I have more to ask, Mr. Chairman, so let me pick it up on the next round.

The CHAIRMAN. OK. The distinguished Senator from Alabama.

Senator HEFLIN. Mr. Justice Rehnquist, you have been asked about the memorandum authored when you were a law clerk with Justice Jackson, and particularly this language: "I realize that it is unpopular and an unhumanitarian position to which I have been excoriated by my liberal colleagues."

When you were a law clerk for Justice Jackson, I believe there has been testimony that each Supreme Court Justice had one law clerk each. Did the law clerks refer to themselves as colleagues?

Justice REHNQUIST. Not that I recall, Senator. I believe there were two law clerks each in most chambers at that time.

Senator HEFLIN. You do not recall whether or not the law clerks referred to themselves as one would speak of his relationship with other law clerks as being my colleagues?

Justice REHNQUIST. I honestly do not, no.

Senator HEFLIN. Do you recall whether, if that was prevalent, a law clerk would refer to his principal, to his judge, as saying that "my colleagues have said such-and-such"?

Justice REHNQUIST. Senator, it is 32 years ago, or whatever it is. I just have very great difficulty remembering whether something like that might have been said or might not. I am sorry.

Senator HEFLIN. Well, I have inquired of my staff whether the staff of the Judiciary Committee refers to other members of the staff as members of a group—as colleagues, and I am informed that they do not; but, of course, there could be a distinction between institutions and close-knit groups.

Now let me ask you about your law practice. I gather from your questionnaire, that you practiced law for 15 or 16 years in Arizona. In that law practice, did you become involved in real estate practice to any degree?

Justice REHNQUIST. I do not think you would say my practice had a large element of real estate in it. I know I handled some commercial closings on occasion, but I do not think it was a significant element.

Senator HEFLIN. Well, now, some bars write title opinions, examine abstracts; some bars in some cities rely upon a title company to do it. I, as a small-town lawyer, used to write title opinions, and I would come across clauses like Caucasian or Jewish. One would note it as an exception to the fee simple title, but universally all title opinions that I recall writing or reviewing, would recite that this is void and unenforceable.

I just wondered whether or not you might have had any experience in your law practice writing title opinions, whether or not you first did it in Phoenix, whether or not you did write title opinions, and whether or not it was written as I have recited?

Justice REHNQUIST. Senator, Arizona was pretty much of a title insurance State. That is, the title companies had taken over from the lawyers, at least by the time I left, most of the kind of title opinion work. And people who were simply handling a real estate transaction did not feel they needed lawyers.

But I think the title insurance company report followed exactly the procedure that you suggest, a notation of the covenant in question and the notation that it was void.

Senator **Heflin**. Now let me direct a little bit toward the issue of federalism, about which a good deal has been written concerning your concepts. Of course, I have a strong belief in federalism, not as an old-fashioned concept of States' rights, but as a belief in State's responsibilities and confidence in the States to govern. This belief is buttressed by the realization that State and local government is closest to the people.

We see unusual things happening on the congressional scene today. We see the left wing knee-jerk liberals and the right wing knee-jerk hardliners all embracing the concept of one Federal legislative act as the cure for any major problem. Now, these widely diverse ideological groups are soulmates on procedure as to finding a single cure.

For example, this may sound unusual for the people on the right, but we have had legislative proposals here that would in effect, by a single stroke of the legislative pen from one single legislative act, cure all of the problems dealing with abortion, gun control, tort reform, labor violence, and others.

My question is, does your belief in constitutional government include a belief that there should be a deference to the States in seeking solutions in areas that traditionally and historically have been considered to be within the jurisdiction of State governments?

Justice **Rehnquist**. Yes, certainly, constitutionally, I feel that way any time the Constitution speaks to the question. I think I said yesterday in answering a question from Senator Broyhill that a lot of those decisions are really nowadays for Congress rather than for the Court, because the commerce power of the Congress is so sweeping. It is a question whether Congress leaves part of it to the States rather than whether the courts are going to set aside part of it for the States.

Senator **Heflin**. Well, does this include criminal laws dealing with the protection of life?

Justice **Rehnquist**. Well, certainly Congress has never made the slightest suggestion that any State law, any State criminal law of the area you describe should be superseded. And I would be very, very reluctant to read that into anything read by Congress.

The Bill of Rights, applicable to the case, obviously limits the way a State can proceed against someone who has violated its criminal laws, but it certainly does not say that you cannot have the criminal laws.

Senator **Heflin**. Does this also include legislation dealing with the civil tort system of the country? Is your belief that there should be a deference to the States?

Justice **Rehnquist**. Well, my belief in that area is certainly that the civil tort area is one of the few Congress has still left to the States, and it would be nice to see them keep it for a while.

Senator **Heflin**. You are basically considered a conservative. Would you give us your thoughts on how a conservative looks at stare decisis?

Justice **Rehnquist**. Stare decisis is the principle, of course, that once a case has been decided—let us take the Supreme Court, for example, because that is what I have been nominated as Chief Justice of—once the Supreme Court has decided a case, that that decision settles the law for the future. And I think—and I am not sure that there is a great deal of difference between conservatives and liberals here, though perhaps I am wrong—when you are looking at a statutory question—that is, let us suppose that in 1950, the Supreme Court has said that a particular act of Congress means thus-and-so, and now, 36 years later, someone is coming back and saying, "Well, the Court was wrong in 1950. If you really look at the legislative history and construe the words the way they ought to be construed, it did not mean thus-and-so." I think every responsible judge would reject that sort of an attack, except under the most extraordinary situation, because when you are talking about a statute, Congress can change the result if it does not like the conclusion the court reaches. If you turn to a similar constitutional question that perhaps was decided in 1950, and now you are urged to reverse it and overturn it in 1986, there is more flexibility, more play in the joints, but still a very strong presumption in favor of the earlier decision, it seems to me.

But nonetheless, the stare decisis principle has a more flexible application when you are talking about constitutional decisions than when you are talking about simple statutory decisions.

The CHAIRMAN. Senator, your time is up.

We will now take a 10-minute recess.

[Short recess.]

The CHAIRMAN. The committee will come to order.

The distinguished Senator from Maryland.

Senator MATHIAS. Thank you, Mr. Chairman.

Justice Rehnquist, let us see if we can put this covenant question to rest. Did you personally attend the settlements for the Vermont property or the Arizona property, or did you handle that through counsel?

Justice REHNQUIST. As to the Arizona property settlement in 1969, I can answer with certainty, because I was back here in Washington by that time, and the house was sold in Arizona. In fact, my wife and kids stayed in Arizona to handle the house sale. So I did not attend that.

The Vermont settlement, I do not believe I attended, but I cannot be sure.

Since I was represented by counsel there, I have a feeling I probably did not.

Senator MATHIAS. So you simply, to the best of your recollection, provided him with a check and told him to go ahead and settle the property and record the deed?

Justice REHNQUIST. That is my recollection, and of course, signed the necessary instruments.

Senator MATHIAS. At the time of the 1969 sale of the Arizona property, you were here in Washington and your representative in Arizona forwarded you the deed to be executed?

Justice REHNQUIST. Well, we were selling at the time—the deed, yes, I would have, I think, signed it back here and sent it back to Arizona.

Senator MATHIAS. Do you recall whether the covenant was merely back in the chain of title and referred to by kind of general language about, "being all the same property, conveyed by John Jones, and subject to the restrictions therein," or was the covenant set out in explicit words?

Justice REHNQUIST. Senator, I just do not remember.

Senator MATHIAS. Well, I assume that that is a matter of record, and we can determine that.

Justice REHNQUIST. I would think so.

Senator MATHIAS. If we could turn to the question that we addressed yesterday: the alleviation of the docket burden. It is my understanding that a committee of four Justices decides whether to grant certiorari.

Justice REHNQUIST. It only takes four Justices to grant certiorari. When you say a committee, Senator——

Senator MATHIAS. Well, that was my word.

Justice REHNQUIST. It is just nine people, basically, sitting around a conference table, and it takes four votes to grant certiorari.

Senator MATHIAS. I did not mean to imply there was any committee structure. I understand that it takes four votes for the court to grant certiorari.

Would it be more restrictive, or would there be a lesser number of certs granted, if five Justices were required?

Justice REHNQUIST. I think obviously it would be a smaller number if you require five than if you require four.

Senator MATHIAS. would that be desirable in the interest of justice?

Justice REHNQUIST. Well, I suppose it depends in a way on how you define the interest of justice. My colleague John Stevens made the suggestion several years ago that one way to help the court's docket would be to require five Justices rather than four to grant certiorari. And it would help the court's docket in a sense in that you would have fewer cases granted, or perhaps different cases granted. But it would also mean it would be more difficult to get certiorari granted; that someone who now gets a hearing in the court by virtue of getting four votes might not get that hearing if five votes were required.

Senator MATHIAS. Considering the overall interest of the administration of justice, if that would relieve the docket and provide the court with more time to be thoughtful and effective, that might promote the overall administration of justice even though fewer writs were issued.

Justice REHNQUIST. Certainly it would limit probably the number of cases the Court takes. I do not right now feel that the court is taking too many cases, but I think some of my colleagues probably do.

Senator MATHIAS. Based on your years of experience as a member of the Court, do you believe that any legislation is required to effect reforms to alleviate the court's docket? For example, would Chief Justice Rehnquist recommend to this committee that we act to abolish the court's mandatory jurisdiction?

Justice REHNQUIST. Senator, it sounds trite to say that I am glad you asked that question, but in fact I am glad that you asked that question. That is a matter upon which all nine members of the Supreme Court, I believe, have expressed agreement. And there is not that agreement on the national court of appeals or on four versus five votes to grant certiorari. I believe all of my colleagues are of the view that the present vestigial mandatory jurisdiction of the court is not necessary for any purpose of justice, and it requires us to hear cases on the merits that we would otherwise not hear.

Senator MATHIAS. What about the Inter-Circuit Tribunal that Chief Justice Burger has been ardently advocating? I know you have written on that subject, and have predicted that a national court of appeals as I think you referred to it, would function in the future as a lower chamber of the Supreme Court.

Could you flesh out that suggestion?

Justice REHNQUIST. I would be happy to, Senator. I do feel quite strongly that we need a national court of appeals to provide us with more nationwide decisionmaking capacity. Right now, the Supreme Court is the only body in the country that has the capacity to decide a legal question on a nationwide basis. And I think a properly-constituted national court of appeals could, by taking statutory cases primarily where there is a conflict between the courts of appeals, take some of that burden off of our court so that our court could take on additional cases, perhaps in the Constitutional area.

Senator MATHIAS. One of the controversial features of the Inter-Circuit Tribunal discussed by this committee was the proposal to have judges from the circuit courts nominated by the Chief Justice. In the alternative, we considered empowering each circuit to nominate a representative for the Inter-Circuit Tribunal.

Do you have any views on how the court should be created and staffed?

Justice REHNQUIST. Yes, I do, Senator. Let me say that if it were necessary to compromise or change my views on any of the views as to how the judge should be selected, or how it should be staffed, I would cheerfully charge them in order to get the national court of appeals. To me, the other things are secondary matters.

But my own view is that appointment by the Chief Justice is unsatisfactory because it gives the Chief Justice too much authority over how this particular court should be constituted.

I think that the proposal for selection by the Circuit Councils is unsatisfactory because I think that would turn the new national court of appeals into something like the United Nations, where the judges on it are primarily loyal to where they came from, rather than to where they are coming to.

In my view, the ideal solution—and maybe Congress is not yet willing to provide this—is to frankly recognize it is a new court, it is going to be here to stay, that the judges should be appointed by the President and confirmed by the Senate—new judges.

The CHAIRMAN. Your time is up, Senator.

The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman.

Mr. Justice, just to follow through on one question that we discussed briefly last night. If at some point in the future, you were to have serious health problems, would you be frank with the American public about those problems?

Justice REHNQUIST. Yes, I would.

Senator SIMON. I thank you.

Second, there is in the Canon of Ethics of the American Bar Association a passage which states "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women and others that the judge's impartiality is impaired."

Do you belong to any organization that might fall in that category?

Justice REHNQUIST. I belong to an organization that I think some people might say would fall into that category, and that is the Alfalfa Club.

Senator SIMON. I confess I am not familiar with the Alfalfa Club. Do you feel that membership in that organization is proper, or do you think the Code of Ethics should be changed?

Justice REHNQUIST. I do not think the Code of Ethics should be changed, but I think when you understand what the Alfalfa Club is, that I do not believe it meets the standard.

The Alfalfa Club is something that I believe has been going on here since 1914, and its only function is to, once a year, hold a dinner. And the Alfalfa Club, as I understand it, is open to men only. And it is not a social club except in the sense that these people get together for dinner once a year, and hear some patriotic music, hear some funny political speeches, and then go their ways for the rest of the year.

Senator SIMON. I do not mean any disrespect to the Alfalfa Club; I have asked nominees for Federal court—either district court or the court of appeals—when they belong to organizations that discriminate, to let me know before I voted on their nomination, whether they would continue that membership. Again, the Alfalfa Club sounds like it is part of the old boys network, and while the tradition may go back to 1914, some traditions that go back to 1914 are not good traditions.

I would simply ask you to reflect upon it and, prior to our voting here in the Judiciary Committee on your nomination, I would appreciate your letting me know whether you wish to continue membership.

Justice REHNQUIST. Certainly. I would be happy to.

Senator SIMON. Let me pose the fundamental question for me—you have been through the confirmation process, both in the last 2 days or and in 1971, and you have reflected and written on the subject. Here is my struggle: On the positive side, we have a nominee of above-average ability, by any standard. We have a nominee who has good writing skills. Most people may not count that as an important asset; I do. We have a nominee who has shown above-average courage. Some of my colleagues view your dissents, the number of your dissents and lone dissents, as a negative; I view it as a plus. If this country to a point where there is suddenly a massive outpouring of public opinion in the wrong directions, I want a Chief Justice who has the courage to stand alone, if necessary, on the side of justice.

On the other side, particularly in the area of race relations, let's go back to the letter to the newspaper. My colleague Senator Hatch said, referring to the Bob Jones University question, that it posed "intricate, difficult questions." The difficulty is that the decisions you have made have been, with few exceptions, on one side of the record in this area. And, as I have said before, I believe the office of Chief Justice is important as a symbol.

The other area where I come down on a different side on decisions that you would make is in that of civil liberties, particularly church-state relations. I know that you quoted Chief Justice Story and his summation of where we are favorably in one decision. With all due deference to Chief Justice Story, I do not think it is an accurate summation of church-state history.

Anyway, I come down on a different side than you would in these areas. I have great respect for you. If you were Paul Simon, faced with that dilemma, how would you vote?

Justice **Rehnquist**. That is a very difficult question, Senator. May I take a moment to think before I answer?

Senator **Simon**. Yes. [Pause.]

Justice **Rehnquist**. Obviously, I cannot give you any very good answer. All I can perhaps give you is two or three reactions to what you have just said. I think it is for you to decide, obviously, Senator, the extent to which your differing with me about my Constitutional views is a ground for voting against me as a nominee.

I might add, just parenthetically, that my reference, I think, in the Wallace against Jaffrey dissent to Justice Story was not to adopt his view of the church-state, but to simply show that he, as a respected and contemporancous commentator, back in the first half of the 19th century, took a view quite different than Jefferson's "wall of church and state".

I think that if it boils down to basically a difference between—in the mind of a Senator—and as I say, it would be presumptuous of me to say this to the Senators, except you have asked me to say it—what is this confirmation process all about? The President obviously has his role in it, but surely the Senate has its role, too. And the President is a sole individual. He can pick someone without—in other words, he alone nominates, whereas 100 Senators end up voting whether or not to confirm. And I suppose the question is how is the Senate's power to be exercised.

And I know a lot of people have spoken on it and written on it. I think you probably have to say that a Senator should not simply say, "This is not the person I would have appointed. I would have rather had someone who felt the religion clause of the First Amendment should be much differently. Therefore, since this nominee does not share my views, I am going to vote against his confirmation."

And yet obviously, the Senate certainly, I do not think, is limited to any particular qualifications. I think, again, putting myself in your place, which is very, very difficult, have I fairly construed the Constitution in my 15 years as an Associate Justice.

Senator **Simon**. I thank you.

Thank you, Mr. Chairman.

The **Chairman**. That completes round two. Now we will start with round three if anybody cares to ask any questions on round three. I will temporarily waive my right to any questions.

The distinguished Senator from Delaware.

Senator BIDEN. I would like to follow up on two things. One, I am just curious about your answer to Senator Heflin about whether or not you referred to in your recommendations to your Justice, Justice Jackson, your coclerks as "colleagues", and Senator Heflin pointed out that that is not what Senators' staffs do. And if I understood your answer, you said you did not recall whether you referred to.

There is a certain memo that you wrote in re Stein, Cooper and Wisner, argued this day—I will have to get the date exactly for you—that you submitted to Justice Jackson, where you referred to your coclerk in the following way in the memo. You say, quote, "Mr. Justice Cronson, not having heard the argument, did not participate in the consideration of this decision and recommendation."

So you referred to your coclerk—just a point of interest—as "Mr. Justice". Did you, or do you, or do you want me to send this on down to you and see if it is the same typewriter and all that?

Justice REHNQUIST. No. I think I have seen that reference. I certainly did not call him "Mr. Justice" in the office. [Laughter.]

I think it was really kind of a form of spoof.

Senator BIDEN. That is why maybe the "colleagues".

And this same Mr. Cronson was reported in the New York—excuse me; let me get the paper right—the Washington Post on July 22, 1986 as saying that you strongly defended *Plessy* v. *Ferguson,* and that you would do that at your luncheon; you said that he was at luncheon meetings with clerks on the days before the 1954 decision, strongly defending *Plessy* v. *Ferguson.*

Is he incorrect?

Justice REHNQUIST. No, I do not think he is. Again, it is hard to remember back, but I think it probably seemed to me at the time that some of the others simply were not facing the arguments on the other side, and I thought they ought to be faced.

Senator BIDEN. So you may have—now, that kind of adds—here, we have got a memo saying, "my colleagues excoriated me", and you say that you were referring to Jackson, not to you. And then you say, well, the implication is it probably was not you, it must have been Jackson, since the word "colleague" was used. But then you have memos that you write where you not only say "colleague", you refer to your coclerk as "Mr. Justice", and then you have the—I am confused.

Justice REHNQUIST. Well, Senator, I am confused by your question, too, because you say other memos where I refer to my coclerk as a "colleague"——

Senator BIDEN. No; as "Mr. Justice."

Justice REHNQUIST. Yes.

Senator BIDEN. Yes. In other words, is it plausible to wonder whether or not you refer to your coclerks as "colleagues". Let me put it this way. If my staff referred to fellow staffpersons here as "Senators", it would seem to undermine his later assertion that he had never referred to them as "colleagues". If he bothered to call them "Senators", jest or not, he might very well refer to them as "colleagues"—I mean, at least from my perspective.

I guess it gets down to—I had not decided to pursue this line at all, quite frankly, until the Senator from Ohio raised it, and I thought you were going to indicate that, yes, it did reflect your views and Justice Jackson's views, and you were arguing the alternative. But you categorically, as I understand it, suggest that the memo to which the Senator from Ohio was referring did not reflect your views, but it was in fact the views of Jackson, not yours at all.

And one of the points that is made is that obviously, that is the case because you referred to "colleagues", and you did not call one another "colleagues" at the time—at least that was the defense made by the Senator From Alabama.

Senator **Heflin**. Well, I think in fairness to him, he said he did not recall.

Senator **Biden**. I understand. I am trying to refresh recollection now. What I am trying to find out very simply is did you believe at the time you were a clerk for Mr. Jackson that *Plessy* v. *Ferguson* should not be overruled? Was that your view at that time?

Justice **Rehnquist**. Senator, I think I answered that question when you asked it yesterday, that I had ideas on both sides, and I do not think I ever really finally settled in my own mind on that.

Senator **Biden**. Do you have any doubt that the people with whom you worked thought that you believed *Plessy* should not be overruled?

I mean, what view do you think that you communicated to other people at the time?

Justice **Rehnquist**. Well, I am sure, you know, as Don Cronson says, around the lunch table I am sure I defended it for the reasons I stated to you yesterday.

Senator **Biden**. Just so you had both sides of it—not defending it because you really believed it, but defending it——

Justice **Rehnquist**. Well, as I said to you yesterday, I thought there were good arguments to be made in support of it. I am sure my talks with Don Cronson were certainly a good deal more detailed than they would be around the lunch table, and I probably expressed myself more fully to him.

Senator **Biden**. On the 14th amendment, you have indicated that—well, your decisions point out that you have a more restrictive view of its application to women than you do, for example, to blacks; and I think your reason is very clear as you set it out why, and one is the rule of reason test. But let me make sure I understand why you have the view you do about the 14th amendment.

Is it because you believe that the 14th amendment was designed as you have once indicated, that it was obviously a Civil War amendment designed to deal with black codes; is that why? I mean, explain to me how you arrived at your——

Justice **Rehnquist**. Senator, I have written on that subject many times in the 15 years I have been on the Court, and it is almost impossible to encapsulate or summarize.

Senator **Biden**. Well, let me encapsulate, and then maybe we can go from there.

As I understand it, one of the rationales you argue, that you use, and you have used it in both speeches you have made and in decisions that you have rendered—let me read from your speech in my home State of Delaware, I believe it was before the State Bar, but it was in 1977. You said, "The question with which the courts have had to wrestle in the ensuing 110 years since the ratification of the 14th amendment, is just how much more did the framers of the

14th amendment mean than to prohibit Southern States from having black codes." End of quote.

Now, is this the question as you see it?

Justice **Rehnquist**. Is what the question? The one you just read, how much more in addition to——

Senator **Biden**. Yes, right.

Justice **Rehnquist**. Yes, I think that is the question and a way of asking what the 14th amendment means.

Senator **Biden**. Do you think that the framers of the 14th amendment meant it only to apply to blacks and the black codes?

Justice **Rehnquist**. I think that was whom it was primarily directed to, but I do not think they meant to limit it to them alone.

Senator **Biden**. Who else did you think they meant to encompass?

Justice **Rehnquist**. Again, Senator, I have written on that for 15 years in various Court opinions. If we are simply talking generalities——

Senator **Biden**. Yes.

Justice **Rehnquist** [continuing]. People who are similarly situated, probably, to be blacks at the time that the 14th amendment was adopted.

Senator **Biden**. Now, as I understand it, your theory as to what latitude a Justice has in interpreting the Constitution and provisions of this Constitution really relates to one that is much more in line with that recently enunciated by the administration of original intent, that it is very important to look back at what the original intent of the framers of the Constitution or the amendment was in order for you to know how it should be interpreted; is that correct?

Justice **Rehnquist**. I am not sure it is entirely correct. I think original intent manifested in the words that the people that drafted the document used is a very important factor in deciding what the provision means.

Senator **Biden**. OK. Now——

The **Chairman**. Senator, your time is up.

Senator **Biden**. OK. I will come back to this.

The **Chairman**. The distinguished Senator from Maryland.

Senator **Mathias**. Let me pick up, Mr. Chairman, on this original intent question, because I think it is an interesting one. It is one that has engaged the attention of the country in recent months. I suppose that the debate that has been going on can be summarized in two terms that are meant to capsulize the contrasting approaches to Constitutional cases; judges who seek to apply "original intent," and those who engage in "judicial activism," one of the Chairman's favorite phrases.

It is a frequent experience for us on this committee to have nominees who come up and say that if confirmed, they would interpret the Constitution pursuant to the original intent of the framers. That is almost a matter of rote with nominees these days. And most of them are willing to take a pledge to resist judicial activism when they look at the Chairman.

The **Chairman**. They have good judgment, don't they? [Laughter.]

Senator **Mathias**. Well, they have prudence in any event.

But if we can get beyond those labels that I think distort the issue, as a practical matter, judges and even legislators are from time to time called to apply the Constitution to an issue that could not possibly have confronted the framers.

There were virtually no public schools in 1787. Issues of prayer in school, school integration, the rights of handicapped students—all of which present difficult Constitutional problems—flow out of the public school system, that system did not exist either physically or, I am sure, in the minds of the framers at the time.

How should the Court approach the problem of applying the words of the Constitution to problems that the Founding Fathers simply could not have foreseen?

Justice **Rehnquist**. Well, there are a number of provisions in the Constitution that are sufficiently general so that they have applicability far beyond what the framers, the people who ratified the Constitution, had before them at the time.

In 1787, there was not a steamboat, there was not a railroad, there was not an airplane; yet they gave Congress no power over buggies or over post roads; they said Congress shall have power to regulate commerce among the several States. And that provision is obviously broad enough to embrace any number of things that have come after. And there is a due process clause in the fifth amendment to the Constitution and also an equal protection component in the due process clause.

The fact that there were not any public schools in 1787 does not mean that those clauses of broad general applicability would not have application where appropriate to institutions that have come after the Framers.

Senator **Mathias**. Of course, a question arises in some cases as to which branch of Government should undertake the corrective action when the Constitution is silent. That question is illustrated from time to time in problems that require the court to enter the political thicket. For example, the one-man-one-vote decision, might have been decided by State legislatures, as far as congressional districts are concerned, or might have been decided by the Congress, but ultimately had to be decided by the Court.

Is that one result which can flow from this doctrine that you have just commented on?

Justice **Rehnquist**. Yes; it certainly is one result that can flow from it.

Senator **Mathias**. What in your judgment is the way to ensure that the decisions of the Court reflect the application of constitutional principles to evolving problems, and to avoid having Justices simply substitute their personal views for the principles that are embodied in the Constitution?

Justice **Rehnquist**. Well, I think probably the best answer I can give is to nominate and appoint judges who sense the difficulty involved in judging; that, as Justice Frankfurter said, if putting on a robe does not make any difference to a man—and he put it as a "man" at that time; he would say "to a man or a woman" now, I suppose—then there is something wrong with that person.

Someone who thinks that they are going to be able to go on a court and apply a whole bunch of kind of horseback opinions, the kind that you form from reading the newspapers, for example—and

I remember this experience, and I daresay an awful lot of other people have had it—of simply reading in the newspapers about a court decision, when I was a lawyer, and saying, you know, "How can that be? That sounds ridiculous." And my wife sits across from me now at the breakfast table, and she will be reading something that the court—and she said, "That is ridiculous." And certainly, when you hear a lot of these decisions described, they sound ridiculous. But sometimes you get back into them, and you see that a surface absurdity really is not an absurdity, in fact, and that your initial reaction to a particular case has got to be tempered by study and that sort of thing.

I do not think taking any particular oath is going to get you a better judge.

Senator MATHIAS. Well, I suppose that that is what this nominating process is all about, to winnow out that very issue.

Do I recall correctly that you said that you had never come to any final conclusion about *Brown* v. *the Board of Education* because of the stare decisis effect of *Plessy* v. *Ferguson*?

Justice REHNQUIST. I thought the stare decisis argument in *Plessy* was a strong one.

Senator MATHIAS. Of course, the nine members of the Supreme Court, alone among all of the Federal judiciary, are the only people who can alter a precedent that is established by the Supreme Court. So, your views about precedent would become extremely important.

When you were here in 1971, you answered a question about precedent by stating that, "A precedent might not be that authoritative if it has stood for a shorter period of time, or if it were the decision of a sharply-divided court."

Is that still your view?

Justice REHNQUIST. I think it is, Senator.

Senator MATHIAS. It would follow, then, that precedents with which you have disagreed, or with which you disagreed at the time you joined the court, but which have now been the law of the land for some 15 or more years, have gained in authority?

Justice REHNQUIST. Other things being equal, I would think so, yes.

Senator MATHIAS. So, that as precedents, they are more binding because of the passage of time?

Justice REHNQUIST. Yes; again, other things being equal.

Senator MATHIAS. Is a precedent more authoritative when it is issued, let us say, over your lone dissent than when you have persuaded two or three colleagues to join in it?

Justice REHNQUIST. Yes; I think it is.

Senator MATHIAS. And these are the kinds of considerations that you would have in mind when you were confronted with the possibility of overturning a precedent?

Justice REHNQUIST. Yes.

Senator MATHIAS. I suppose——

The CHAIRMAN. Senator, your time is up.

Senator MATHIAS. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Mr. Rehnquist, just to wind up on the *Laird-Tatum* case, that was important, I believe, given our previous exchange. One of the important results of your vote and the majority opinion on that was the denial to the American people of the kind of discovery that might have taken place if there had been a different judgment, and in the course of discovery procedures, if that had been reversed, the American people would have probably learned a good deal more about the Huston plan and about the army surveillance of private citizens, and the CIA illegal domestic surveillance operations—all of which were going on at that time.

You were in the Office of Legal Counsel during the period that was described in the earlier discussion. I have tried to get from the Office of Legal Counsel any memoranda that you might have written about that subject matter, about either civil rights or civil liberties, or about surveillances. Do you know whether you wrote any memoranda about those subjects?

Justice REHNQUIST. I would expect over a period of 3 years I probably did.

Senator KENNEDY. Well, is there any reason that you would be reluctant to provide those memoranda to us on civil liberties or civil rights or on national security?

Justice REHNQUIST. I do not believe I have them.

Senator KENNEDY. You have not retained copies of those?

Justice REHNQUIST. I do not think so.

Senator KENNEDY. Well, would you be willing to urge the Justice Department to make those available to us?

Justice REHNQUIST. I would certainly waive any claim that I have so far as the Justice Department——

The CHAIRMAN. Senator, I might make a statement on that. The Justice Department feels that interoffice memoranda are confidential, they are privileged, and they do not intend to make them public. I concur with that opinion, because if the Attorney General cannot talk to his own staff in confidence and get their opinions and bat things back and forth, it seems the public is not well served.

Senator KENNEDY. Well, the President of the United States—and I would ask that his memorandum on this for the heads of Executive departments and agencies, subject, procedures governing response to congressional requests for information—I will ask that the entire memorandum be made a part of the record, Mr. Chairman.

May that be made a part of the record?

The CHAIRMAN. Without objection.

[Document follows:]

MEMORANDUM FROM PRESIDENT RONALD REAGAN FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, ON PROCEDURES GOVERNING RESPONSES TO CONGRESSIONAL REQUESTS FOR INFORMATION, NOVEMBER 4, 1982

THE WHITE HOUS
WASHINGTON

November 4, 1982

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS
AND AGENCIES

SUBJECT: Procedures Governing Responses to Congressional Requests for Information

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches. To ensure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific Presidential authorization.

The Supreme Court has held that the Executive Branch may occasionally find it necessary and proper to preserve the confidentiality of national security secrets, deliberative communications that form a part of the decision-making process, or other information important to the discharge of the Executive Branch's constitutional responsibilities. Legitimate and appropriate claims of privilege should not thoughtlessly be waived. However, to ensure that this Administration acts responsibly and consistently in the exercise of its duties, with due regard for the responsibilities and prerogatives of Congress, the following procedures shall be followed whenever Congressional requests for information raise concerns regarding the confidentiality of the information sought:

1. Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege. A "substantial question of executive privilege" exists if disclosure of the information requested might significantly impair the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or

other aspects of the performance of the Executive Branch's constitutional duties.

2. If the head of an executive department or agency ("Department Head") believes, after consultation with department counsel, that compliance with a Congressional request for information raises a substantial question of executive privilege, he shall promptly notify and consult with the Attorney General through the Assistant Attorney General for the Office of Legal Counsel, and shall also promptly notify and consult with the Counsel to the President. If the information requested of a department or agency derives in whole or in part from information received from another department or agency, the latter entity shall also be consulted as to whether disclosure of the information raises a substantial question of executive privilege.

3. Every effort shall be made to comply with the Congressional request in a manner consistent with the legitimate needs of the Executive Branch. The Department Head, the Attorney General and the Counsel to the President may, in the exercise of their discretion in the circumstances, determine that executive privilege shall not be invoked and release the requested information.

4. If the Department Head, the Attorney General or the Counsel to the President believes, after consultation, that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President, who will advise the Department Head and the Attorney General of the President's decision.

5. Pending a final Presidential decision on the matter, the Department Head shall request the Congressional body to hold its request for the information in abeyance. The Department Head shall expressly indicate that the purpose of this request is to protect the privilege pending a Presidential decision, and that the request itself does not constitute a claim of privilege.

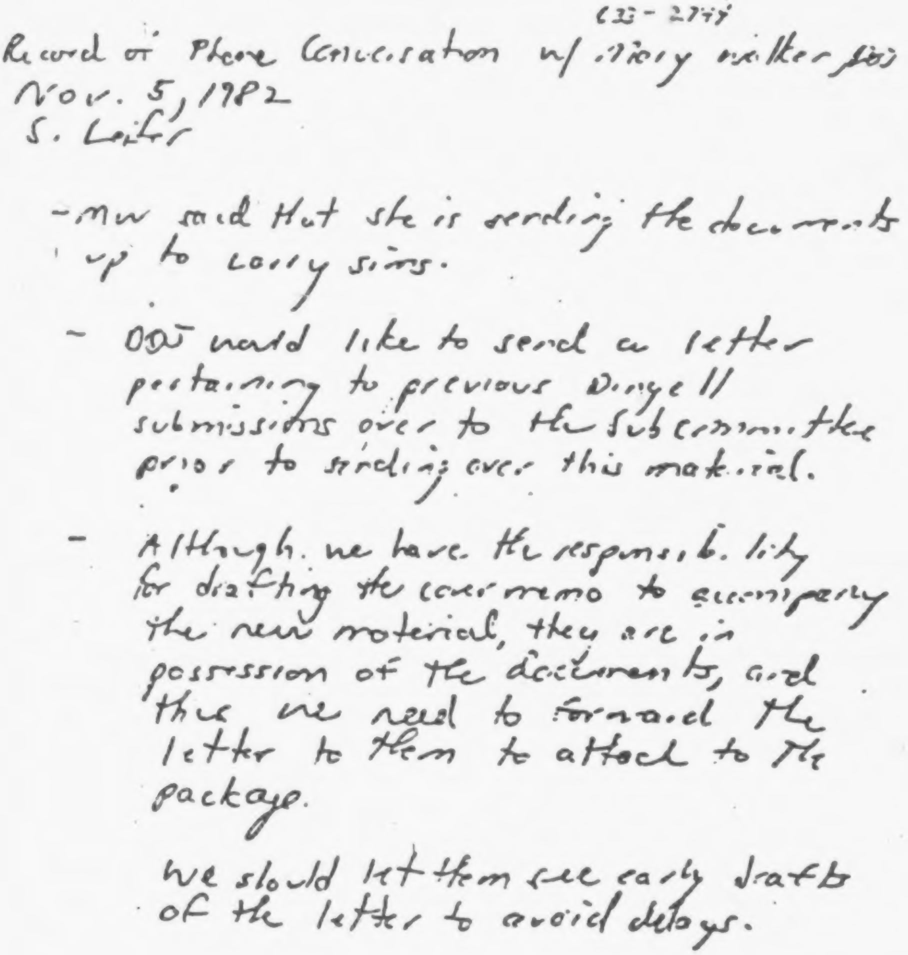
6. If the President decides to invoke executive privilege, the Department Head shall advise the

requesting Congressional body that the claim of executive privilege is being made with the specific approval of the President.

Any questions concerning these procedures or related matters should be addressed to the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, and to the Counsel to the President.

Ronald Reagan

Handwritten Record of Telephone Conversation With Mary Walker, Prepared by Steve Leifer, November 5, 1982



633-2777

Record of Phone Conversation w/ Mary Walker DOJ
Nov. 5, 1982
S. Leifer

- MW said that she is sending the documents up to Larry Sims.

- DOJ would like to send a letter pertaining to previous Dingell submissions over to the Subcommittee prior to sending over this material.

- Although we have the responsibility for drafting the cover memo to accompany the new material, they are in possession of the documents, and thus we need to forward the letter to them to attach to the package.

We should let them see early drafts of the letter to avoid delays.

Senator **Kennedy**. I quote:

> Congressional requests for information shall be complied with as promptly and as fully as possible unless it is determined that compliance raises a substantial question of executive privilege.

And the Justice Department refuses to say whether it does. It either ought to say that it does and involves the question on executive privilege, or these memoranda ought to be available to the members of this committee when we are considering the qualifications of this nominee on the basic issues and questions involving civil rights and civil liberties, the views of this nominee. And I think we do a disservice to the consideration of this committee and to the nominee not to be able to examine those.

I have requested that. That request has been made to the chairman. We have received a response from the Justice Department refusing to make those available.

The nominee himself this morning says he is quite prepared to waive any consideration. So, I would renew my request, Mr. Chairman, given the view of the nominee that he is prepared to waive any privilege, and that we make a request of the Attorney General to receive it.

Senator **Biden**. If the Senator would yield——

The **Chairman**. The Attorney General is the chief legal advisor for the President and the entire executive branch. The function of the Office of Legal Counsel is to act as his delegate. Therefore, the Assistant Attorney General for the Office of Legal Counsel is the lawyer for the President's lawyer. The internal materials in the Office are confidential and represent the highest form of privileged communication. These internal documents are the manifestations of far-ranging legal and policy considerations. As a matter of principle, the release of these documents would have a devastating impact on the full and free debate and discussion which are required in the Office of Legal Counsel.

If the highest officials in the Nation are to have the sound and legal advice on which many of their important decisions depend, this debate must not be restricted out of fear that it may become public knowledge.

Additionally, I question the relevancy of materials which are over 15 years old and which I understand were not requested during the 1971 confirmation hearings.

For these reasons, I will not press any further for these internal confidental documents.

Senator **Kennedy**. Mr. Chairman, I would point out that the remaining part of that paragraph I mentioned—I will read the full paragraph:

> Congressional requests for information shall be complied with as promptly and as fully as possible unless it is determined that compliance raises a substantial question of executive privilege. A substantial question of executive privilege exists if disclosure of the information requested might significantly impair the national security, including the conduct of foreign relations, the deliberative process of the Executive Branch, or other aspects of the performance of the Executive Branch Constitutional duties.

Now, I would just say the failure of being able to gain that information, which the nominee himself has indicated his willingness to waive, does a disservice both to the nominee, to the committee and to the Constitution.

And what we are talking about here are civil rights issues, issues on civil liberties, in which this nominee had a very direct—anything that he would say with regard to the various domestic surveillance provisions.

I think it is a real disservice to the nominee and this committee to refuse to insist that the Attorney General provide that information.

I yield to the——

The CHAIRMAN. Although the witness might be willing to do it, the Justice Department feels that it would be improper. For instance, in my office, if I could not talk to my staff members confidentially and get their honest opinion, back and forth, and batting things back and forth, without the public knowing everything that went on, I do not see how I could well serve the public.

The Justice Department feels the same way. They want to have freedom to discuss with their staff members, to write memorandums, to get suggestions, to make recommendations, but if all of it is exposed to the public, it would jeopardize the best interests of the public in my judgment.

Senator BIDEN. Mr. Chairman, if I could just briefly comment on that, we may have much ado about nothing here. If the Justice Department does not want this to be released, all they have to do is exert executive privilege. If they do not exert executive privilege, then they should explain to us why they are changing a pattern they have kept for years and years.

Let me just point two things out. In Mr. Cooper's nomination to go over to that Department and Mr. Brad Reynolds, where we asked for internal documents, we worked out an agreement, as we always have in this committee, where staff members went down in the presence of the Justice Department. In both of those cases, in this administration, Office of Legal Counsel documents were made available; they were made available with regard to both of those instances, No. 1.

No. 2, let me point out that if the rationale which the Justice Department offers in fact has any validity, it seems to me it loses its validity as time passes. It is one thing to say that you are not going to allow contemporaneous memoranda out, and you do not want to in fact exert executive privilege. But we are talking about something that is 25 years old, as the Justice keeps pointing out to us; this is 25 years ago. What are we talking about here? How is the impairment of national security, or the impairment of the ability to do work going to be impaired by something 25 years ago?

Third, as everyone who follows this knows, since 1977 they have published memoranda from the Office of Legal Counsel. It has been the policy of the Office of Legal Counsel to publish in a book memoranda.

Now, I really do think this is a disservice to the nominee. The only implication that can be drawn from this, if executive privilege is not being exerted, is that there is something to hide. The nominee has nothing to hide, nothing at all to hide.

How can Justice possibly be harmed if in fact they are going to release memoranda that an assistant or a lawyer in that division wrote 25 years ago or more——

Senator **HATCH**. Mr. Chairman——

Senator **BIDEN** [continuing]. On civil rights, unless it is of national security interest. And if it is, tell us, and we will stop.

Senator **HATCH**. Mr. Chairman.

The **CHAIRMAN**. The distinguished Senator from Utah.

Senator **HATCH**. You have stated it pretty well. This is the Office of Legal Counsel. You are not asking for Brad Reynolds' and Chuck Cooper's materials. You are asking for materials before this man becomes an Associate Justice of the U.S. Supreme Court.

It seems to me that we ought to be judging him from that time forward. And you are asking it from the Office of Legal Counsel which to my knowledge has never given materials to us——

Senator **BIDEN**. Oh, well, I have it right here.

Senator **HATCH** [continuing]. And the reason is—let me just say this——

Senator **BIDEN**. I have it right here in my mind. These are memoranda from the Office of Legal Counsel.

Senator **HATCH**. Let me say—not to my knowledge then.

Senator **KENNEDY**. Oh? [Laughter.]

Senator **BIDEN**. They are right here.

Senator **HATCH**. Those are not from the Office of Legal Counsel. And I do not think you can prove it. They are from the Office of Civil Rights. Do not misstate the law. Do not misstate where you got them.

I do not know of any case where you have been able to get materials from the Office of Legal Counsel.

Senator **BIDEN**. If I can help the Senator, these are from the Office of——

The **CHAIRMAN**. Let him finish.

Senator **BIDEN**. Oh, I am sorry. I was going to answer his question.

Senator **HATCH**. Go ahead and answer.

Senator **BIDEN**. They are from the Office of Legal Counsel to the House of Representatives——

Senator **HATCH**. They may have been delivered to you, but they come from the Civil Rights Division.

Senator **BIDEN**. No, no; the top one, let me just read it to you here——

Senator **KENNEDY**. Can we recess for lunch?

Senator **HATCH**. To my knowledge, never in the history of the Justice Department, whether it was under Robert F. Kennedy or under Edwin Meese, have they given up internal memoranda.

Second, this is not Brad Reynolds who is up for confirmation. This is not Chuck Cooper. This is a man who served 15 years on the U.S. Supreme Court. You are asking for memoranda from, basically, 3 or 4 years before he became a member of the Supreme Court from the Office of Legal Counsel.

Senator **BIDEN**. Orrin, let me ask you a question.

Senator **HATCH**. Now, wait. Let me just make one other point.

Senator **BIDEN**. I am sorry.

Senator **HATCH**. I understand why anybody——

The **Chairman**. The Senator from Utah has the floor.

Senator **Hatch**. I can understand why any Democrat would love to go through all the materials of the Justice Department pertaining to any Republican administration. I would like to do it pertaining to any Democratic administration. And I might even enjoy the Republican administration.

The fact of the matter is, as Senator Thurmond has stated, it is very tough for an Attorney General to get honest, candid comments, from internal people within the Justice Department if they know that everything they state is going to be subject to review by Congress in a partisan battle over somebody's nomination.

You are asking for things that you really do not have a right to.

Senator **Biden**. Orrin——

The **Chairman**. Senator Metzenbaum, I believe, wanted to speak.

Senator **Biden**. Excuse me.

Senator **Metzenbaum**. No. I am fine.

The **Chairman**. Senator Biden.

Senator **Biden**. Thank you, Mr. Chairman.

What I do not understand here is that there seem to be two issues that the Senator from Utah raises—one is the legitimacy of an arm of the Government to deny another arm of the Government memoranda sought for; the second is whether or not it is legitimate to inquire as to what a nominee for Chief Justice wrote 25 years ago. There are two separate issues. Let us leave the latter issue aside. The argumentation given by the Justice Department for not making available these memoranda says nothing about Justice Rehnquist; it does not speak to that question. It speaks to the legitimacy of this body having access to, as a matter of principle, documents.

If we here today conclude that this body does not have the right to have access to those documents unless executive privilege is claimed, we have set a precedent.

With all due respect, Mr. Justice, I do not care about you in this; I care about the precedent. The fact is that we either are going to have a precedent set where they in fact abide by the law and say executive privilege, or they should come forward, like we always have in the past, with an agreement whereby we negotiate in good faith the access to and what documents they are given access to.

But here there is a blanket assertion made, for the first time in this administration, a blanket assertion, and in conflict with what the President says, that everything is open.

And just for the record, the memorandum I am holding here, for example, is a memorandum from Theodore Olsen to Paul McGrath, "Revised Draft of Summary Judgment Motion in United States versus House of Representatives, U.S. Department of Justice, Office of Legal Counsel," dated 7 January, 1983. Now, it is on a different matter. It was on the Burford fight. But it did not require subpoena. That is how we used to do it. We used to do it that way. And I do not know why, all of a sudden, we are changing.

It seems to me the request the Senator from Massachusetts made is in fact a reasonable one. And it has always been——

The **Chairman**. Senator——

Senator **Biden** [continuing]. If I could finish, Mr. Chairman—it has always been done on a confidential basis. That is how we have done it before. That is how this committee has done it, and I do not know why it has changed.

The CHAIRMAN. Senator, isn't it a fact that those documents were not provided to the Congress, but they were provided from one Government agency to another?

Senator BIDEN. Pardon me?

The CHAIRMAN. Weren't those documents provided from one Government agency to another, and not to the Congress?

Senator HATCH. That is correct.

Senator BIDEN. No. They were provided to the Congress.

Senator HATCH. No. They come from another Government agency.

Senator BIDEN. I ask the able Counsel to tell you what you have in your hand there—and maybe I am mistaken.

Senator HATCH. You are.

Mr. SHORT. Senator, it is my understanding these documents were provided to a Government agency and not to a committee of Congress.

Senator HATCH. Mr. Chairman.

The CHAIRMAN. Senator Hatch.

Senator HATCH. This committee has never to my knowledge received an internal memo directly from the Department of Justice and certainly directly from the Office of Legal Counsel. I would be happy to stand corrected if I am wrong. However, I do not believe I am.

The Justice Department might have given records to other offices or other agencies or departments, but never have they given up internal memos. They have good reason for doing that because they want it to function as a Justice Department. Anybody can understand that.

I can understand why certain people want to go on a fishing expedition. But that is not what should be done.

The CHAIRMAN. Senator Hatch, I happen to see Mr. Bolton here, who is from the Office of Legislative Affairs, Assistant Attorney General, and I am going to ask him to come up right now and respond to some questions.

If you will stand up and take the oath—will the testimony you will give in this hearing be the truth, the whole truth, and nothing but the truth, so help you, God.

Mr. BOLTON. It will.

Senator MATHIAS. Mr. Chairman, shouldn't Justice Rehnquist retire from the table?

The CHAIRMAN. Justice Rehnquist, we will excuse you now until 2 o'clock. We will go back at 2 o'clock.

Justice REHNQUIST. Thank you, Mr. Chairman.

Senator BIDEN. Aren't you glad you are in the court and not the Senate, Mr. Justice?

Senator HEFLIN. It seems to me we ought to have sort of an opinion right now from the Supreme Court Justice. [Laughter.] It is pretty clear here that this is an Executive order signed by the President, and it is pretty clear as to what procedure is to be followed. It seems to me on the face of it, it says so.

The **Chairman**. Mr. Bolton, would you explain the policy of the Justice Department on this matter? You have heard the conversation here. Give us the theater behind it.

TESTIMONY OF JOHN R. BOLTON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE

Mr. **Bolton**. Yes, thank you, Mr. Chairman.

I might say, in response to a point that Senator Biden made, that after receipt of his letter dated, I believe, July 24, we did produce some documents that he had requested. Those documents contained, in every case, legal advice that had been transmitted outside the Office of Legal Counsel, in some cases, to other components of the Department of Justice, in some cases, to other Government agencies, as I recall.

Senator Hatch, however, has correctly stated that to our knowledge, there have never been provided to this committee internal deliberative documents from the Office of Legal Counsel or, I might add, by way of analogy, the Solicitor General's Office. And there are numerous precedents for that that we have followed.

Senator **Metzenbaum**. What about the *Brad Reynolds* case and the *Cooper* case?

The **Chairman**. What about these particular documents?

Mr. **Bolton**. I do not know which ones you have in your hand, Mr. Chairman, but I believe one that was referred to was from the Office of Legal Counsel to Mr. McGrath, who at one point was with the Civil Division.

The **Chairman**. That is right; memorandum to Paul J. McGrath, Assistant Attorney General, Civil Division.

Mr. **Bolton**. Yes, Mr. Chairman. That would be consistent with what I just said. It was a document transmitted from the Office of Legal Counsel to another component of the Department of Justice. We have produced that in response to Senator Biden's earlier request.

Could I say one other thing, please, Mr. Chairman? Senator Biden referred to a practice since 1977—I think it goes back before that—that some opinions of the Office of Legal Counsel are published. That is correct. In OLC's function as the President's lawyer's lawyer, there are occasions where such things are made public. The reason for that is so that the President's chief legal adviser, acting through his Assistant Attorney General, can advise other components of the executive branch and the public at large as to a particular position taken on a legal issue.

And I would submit, quite respectfully, that that is quite different from the internal deliberative documents that we are referring to here.

The **Chairman**. Senator Biden, do you want to ask a question?

Senator **Kennedy**. May I——

Senator **Biden**. Go ahead.

Senator **Kennedy**. Well, are you exerting executive privilege, then, on this request?

Mr. **Bolton**. Senator Kennedy, I am not authorized at this point to assert executive privilege. We have received, first, a letter from Senator Biden on behalf of three Senators, as I recall.

Senator **Kennedy**. That is correct.

Mr. **Bolton**. We responded to that on Friday, July 25. Senator Thurmond transmitted another letter to me from Senator Biden that we responded to on July 30. In neither case did we assert executive privilege. In the July 30 letter, to show the length and consistency of the policy that we articulated in the letter, we attached a memorandum by former Assistant Attorney General for the Office of Legal Counsel, Antonin Scalia, dating back to the 1970's, which took basically the same position.

It is because of the highly sensitive nature of the internal OLC deliberations in their function of advice giving to the Attorney General—and as I say, the same argument can be made with respect to the Office of the Solicitor General—that we respectfully declined to produce those internal documents.

Senator **Kennedy**. Well, with all respect, the President of the United States has issued a memorandum. You are an executive department, are you not?

Mr. **Bolton**. The Department of Justice is an executive department, that is correct.

Senator **Kennedy**. The memorandum has the subject procedures governing response. And you are familiar, I am sure, with that Executive order, and it indicates that there is only one justification for withholding information, and that is executive privilege, and it spells out the procedure by which that should be made.

Now we are asking you now, you are either going to follow, as I imagine, the President's order on this, or if you are not, I want to know why not.

Mr. **Bolton**. Senator Kennedy, I think it has been the consistent position of administrations, whether Republican or Democrat, that documents have not been produced to Congress for reasons other than executive privilege where there are, within the opinion of the particular executive agency involved, sound reasons for not so doing.

I do not have a copy of the Executive order——

Senator **Kennedy**. Well, you provide the precedents on that. You provide the precedents to this committee.

Senator **Heflin**. I think that is immaterial. I think it is immaterial. Here, you have a White House order, an Executive order by the President, Ronald Reagan, dated November 4, 1984; and the only exception—it states that in regard to congressional requests for information, the only exception to where it will be complied with promptly and fully is where the disclosure of the information requested might significantly impair the national security. Then it becomes a substantial question of executive privilege. It provides for the procedure to be followed relative to the matter, and it even calls for consultation with the Counsel for the President outside the Attorney General's office. Unless it is a matter of national security and is declared to be a substantial question of executive privilege, it appears to me that the action thus far, unless you can give me a good explanation, is in violation of the President's Executive order.

Mr. **Bolton**. Senator, I feel quite comfortable in saying that we are not in violation of the President's Executive order. I would find it very difficult, obviously, if I were in that position.

I think in your reference to the Executive order, though, you—after referring to national security—you left out the other clauses that applied, and one of them in particular—I do not have the exact words in my mind—but one clause was documents that did deal with executive branch deliberations, quite apart from national security concerns.

Senator **Heflin**. Well, it may be. I just read this right now, but I do not see it right there. It may be.

Mr. **Bolton**. Could I respectfully ask, Mr. Chairman, if I could make an inquiry of Senator Biden?

Senator **Biden**. Sure.

Mr. **Bolton**. Excuse me, Senator. Did I understand you, or perhaps it was Senator Kennedy, to say that if an assertion of executive privilege were made with respect to these documents, that that would be the end of the matter?

Senator **Biden**. Well, yes. It would be the end of the matter in terms of whether or not we would then challenge the—I mean, it would be the end of this matter, whether you have a right to claim it under some nebulous thing that I do not understand in light of this document and the President's order.

As far as I am concerned, I think if the President is going to change the groundrules, then he can do that. I would have to get legal advice as to whether or not then there is a battle over what constitutes executive privilege, but you are clearly on stronger grounds. I mean, quite frankly, I think you all look foolish, unless I am missing something here, to make the case like you are making it when, in fact, the documents that you could let the staff look at are not going to make any difference anyway.

I mean, I do not know why we get in these fights here in this place. It is like a tempest in a teapot, a great, big fight. If it is so important, claim executive privilege, and then that is probably going to be the end of it; if it is not——

Senator **Metzenbaum**. I take issue——

Senator **Hatch**. Mr. Chairman, Mr. Chairman.

The **Chairman**. We are going to recess for lunch now, and we will continue——

Senator **Hatch**. Mr. Chairman, could I just make one comment.

Senator **Metzenbaum**. Well, Mr. Chairman, before you recess, I just want to say——

The **Chairman**. Senator Metzenbaum.

Senator **Metzenbaum**. I just want to say that I do not believe that in this kind of matter that just claiming executive privilege when there is no reason for it makes any sense or is logical, and I think you were starting to go down the road of going back to the office and asking them to claim executive privilege.

I believe we have got a Chief Justice of the Supreme Court to confirm, or to deny him confirmation. He is willing to have the information made available. And for some reason that I am not clear about, the administration is now bucking against making the information available. Let us put the facts out, and whatever the facts are, they will speak for themselves. But do not now just take the position, "Well, if you just say that asserting executive privilege will be adequate, then maybe we will go back and do that."

I think that that would demean the process, and I believe it would also reflect negatively on the whole confirmation proceeding.

Senator **Hatch**. Mr. Chairman.

Senator **Biden**. Mr. Chairman.

The **Chairman**. Just a minute. Senator Hatch.

Senator **Hatch**. Mr. Chairman, it is only fair to read some of the language that the Office of Legal Counsel wrote, to Senator Thurmond. It lays it out pretty carefully. It is astute and well-thought-out. Anybody who is fair can understand why you are taking this position. I do not care whether you assert executive privilege or not. Either way you should not give up these materials voluntarily.

Let me just read this:

> As you are aware, the primary function of the Office of Legal Counsel is to provide legal advice to the President and to executive branch agencies often on difficult and controversial subjects:
>
> The integrity of the advice given by the Office and the willingness of agencies to seek and follow that advice depend largely on OLC's, the Office of Legal Counsel's, ability to protect client confidences and to discuss fully all of the legal implications raised by issues referred to the Office.
>
> The advice that OLC renders is almost always part of a larger decisionmaking process within the executive branch. For that reason the Office of Legal Counsel has consistently taken the position, in response to Freedom of Information Act and other requests—

This is well-known throughout the Government—

> That it is not at liberty to disclose confidential memoranda, opinions, and other deliberative materials whose release would compromise the Office of Legal Counsel's continuing ability to provide objective legal advice to the executive branch.

Your letter makes other points, but that is all I care to read.

Let us be honest here. You have never given these materials to anybody before. We have a sitting Justice who has a tremendous record, the recommendation of every sitting Justice, and who has been on the court for 15 years. We have spent an awful lot of time during the last two days trying to dredge up any little item we can for 15 or 25 years before he came on the Bench.

It is easy for me to understand why any legal office would not want its internal memoranda given up. By doing so, you make it completely probable that future opinions are always going to be politically oriented, rather than candid advice to whomever has asked for that advice in particular, the President or any other agency, or any other person within the Department.

Your letter states it pretty well.

The only thing I can see here is an effort to dredge up anything they can on "fishing expeditions". This is not new around here. We all ought to call it like it is.

The **Chairman**. Mr. Bolton, if you want to make a statement, and then we are going to recess for lunch.

Mr. **Bolton**. Thank you, Mr. Chairman.

I just wanted to clear up two points that Senator Metzenbaum made, and I regret that he is not here to hear them.

When I asked the question of Senator Biden, which he was kind enough to answer, I was simply trying to understand the point that he had made before.

Second, Justice Rehnquist's response to the question that was put to him, of course, has Justice Rehnquist in the analogy of lawyer and client, when he was the head of the Office of Legal Counsel. It is not the attorney's position to be able to waive the privilege; it is the client's. And, of course, in the case of his service as Assistant Attorney General for the Office of Legal Counsel, the U.S. Government was the client.

Senator BIDEN. The confusion here, though, if I may—the client is the President of the United States. The President of the United States has said, unless we misunderstand this document, that, in fact, all but for those areas where I claim executive privilege, should be made available.

So, on the face of it, it appears as though both the lawyer and the client are saying these documents should be released. That is what the confusion is.

And so what I say to you is I would just like an explanation over lunchtime; (a) I would like to renew the request; (b) I would like to ask you if, in fact, I misread the document—and I may have; maybe I have misread the Executive order, and (c) whether or not, regardless of what you conclude, you would at least make an index available of what we are talking about. That is all, I do not want to keep the committee——

The CHAIRMAN. I think all of them understand the question now.

We are going to recess now, and we will continue after lunch, 2:15. We are in recess until 2:15.

[Whereupon, at 1:20 p.m., the committee recessed, to reconvene at 2:15 p.m. this same day.]

AFTERNOON SESSION

[Whereupon, at 2:23 p.m., the committee reconvened, Hon. Strom Thurmond presiding.]

The CHAIRMAN. The committee will come to order.

The matter that we were discussing before lunch has been referred to the Justice Department for consideration. In the meantime, we will go ahead with the hearing.

The distinguished Senator from Ohio is recognized.

Senator METZENBAUM. Mr. Justice, I indicated this morning that one of my major concerns has become the issue of your candor, your forthrightness, and I want to go back for a moment to one question about this entire memo in the Justice Jackson matter.

In the memo, just above your initials, you said, "I think Plessy against Ferguson was right and should be reaffirmed." That is very straight language.

Your fellow clerk at the time, Donald Cronson, said, "Unquestionably, in our luncheon meetings with the clerks, he"—meaning you—"did defend the view that Plessy was right."

So, we now have you saying that in a memo, and we have Don Cronson saying that that is the position you took. And you certainly had a right to take any position you wanted to take.

Then, that became an issue in 1971, and so you wrote a letter to Senator Eastland. And at that time you said:

I am fortified in this conclusion because the bold, simplistic conclusion that Plessy against Ferguson was right and should be reaffirmed is not an accurate statement of my own views at the time.

Now, we have your statement in the memo. We have Cronson saying that is the position you were taking. We then have the letter from you to the committee in 1971 saying that is not an accurate statement of my own views at the time. So, we have a total reversal at that point.

Then, we have Senator Biden inquiring of you concerning the same issue. And you say at that point, "I do not think I reached a conclusion. Law clerks do not have to vote." I really do not know that I care exactly what your position was, but I find that you thought that Plessy against Ferguson was right; you indicate in the letter then that that was not your view; and then you say you did not reach a conclusion. Law clerks do not have to vote.

Many have indicated concern about some of your decisions. I am not addressing myself to that issue. I am saying I do not understand Justice Rehnquist. He is three different places: He is for, he is against, and he does not have a position; law clerks do not have to vote.

Would you explain for me that which appears on its face to be totally irreconcilable and a total divergence of opinion, three different opinions, actually, on the same question.

Justice REHNQUIST. I think in answer to Senator Biden's question yesterday as to reconstructing what my view at that time would have been in 1952, I said the reasons I thought the thing had arguments on both sides at that time. I think the reconstructing again on the basis of this memo, I would suspect that a logical interpretation in the last paragraph is I perhaps imagined this was the way Justices spoke in conference.

Insofar as the statements about, you know, arguing that Plessy against Ferguson was right at the time, law clerks, I do not doubt that is correct. I think there is also an interview with Mr. Cronson in 1971 indicating that I had told him that that was not a correct statement.

Senator METZENBAUM. In *Wallace* v. *Jaffrey*, you dissented from the decision of the Court to strike down the Alabama State statute regarding prayer in schools. Now, what concerns me is that you took the most extreme view of any member of the Court.

I am not addressing myself to the decision of the Court. That is yesterday's news. You said:

> The Framers intended the establishment clause to prohibit the designation of any church as a national one. The clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over another. Nothing in the establishment clause requires government to be strictly neutral between religion and irreligion.

In other words, so long as the Government does not promote a particular religion, the Government can then promote religion. Is that your view?

Justice REHNQUIST. I think the opinion speaks for itself, Senator. It is all written out. And I would also want to add that that case, as I recall, was not an Alabama statute requiring prayer in school. It was a statute allowing a moment of silence.

Senator METZENBAUM. All right. That is fine. But the question is, your view is that the Government can promote religion as long as it does not promote a particular religion. I am not asking you about the Court decision. I am just asking about your view.

Justice REHNQUIST. I do not think that is a completely accurate summary of Wallace against Jaffrey. I think that the statement you read, that the 1st amendment, the religion clause, does not require the Government to be neutral between religion and irreligion I think is a correct statement.

Senator METZENBAUM. Let me ask you a general question. Put yourself in the position of a member of a religious minority today. Maybe you are Jewish, maybe you are a Buddhist, maybe you are an agnostic. How would you feel if Government officials came to your school or office and said that all persons should go to church. How would you feel as an individual, not as Justice?

In other words, if you were an atheist, an agnostic, or if you attended a mosque or synagogue rather than a church and they told you you should go to church, how would you feel about that?

Justice REHNQUIST. I would be outraged.

Senator METZENBAUM. So would I.

I can think of a lot of Government programs that, to me, would promote religion. What if the Government requires us to join some religion, any religion, the religion of our choice in order to be eligible for Government office? That would not be the promotion of a particular religion, would it?

Justice REHNQUIST. Your hypothesis is that the Government requires that you be a member of some religion before you can run for public office.

Senator METZENBAUM. That is right.

Justice REHNQUIST. I would not think that was the promotion of a particular religion, no.

Senator METZENBAUM. And that probably would be in accordance with the Constitution?

Justice REHNQUIST. Not in my view.

Senator METZENBAUM. Not in your view.

Justice REHNQUIST. No.

Senator METZENBAUM. Well, let us see if I am clear. You said you would not think that would be the promotion of a particular religion; therefore, following your position in the *Wallace* v. *Jaffrey* case, that would be permissible as long as Government does not promote a particular religion?

Justice REHNQUIST. I do not believe that, in my opinion, Wallace against Jaffrey got into the kind of hypotheticals that you are suggesting now, Senator.

Senator METZENBAUM. I agree with that, but what concerns me is your words in that case.

> As its history abundantly shows, however, nothing in the establishment clause requires Government to be strictly neutral between religion and irreligion, nor does that clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

That is the reason for my hypothetical questions.

I can see that the hypothetical questions I have are all premised on the fact that you are not promoting a particular religion; you are just promoting religion as against irreligion.

Therefore, I am asking you whether or not you would have any difficulty with the Government requiring a person to join some religion in order to be eligible for office.

Justice **Rehnquist**. I would have a great deal of difficulty with it, Senator.

The **Chairman**. Senator, I believe your time is up.

The distinguished Senator from Alabama.

Senator **Heflin**. Justice Rehnquist, the media reports have at times revealed what they think may be a correct routine of a person's life or lifestyle or what he may do on a daily basis. But involved here are the news reports that you usually will go to work in the morning, sometimes, as I recall the media has indicated, at 9, and that you would work until about 2:30 or 3. I do not remember exactly. And then you would swim, exercise during the day. Is that a fair statement? You write you worked hard during that period of time, but is that a fair summary of your daily work routine?

Justice **Rehnquist**. It is accurate as far as it goes, but it leaves a misleading impression that one can do the job of an Associate Justice in 6 hours a day. That cannot be done, and the practice I developed was because I did find it very good for me physically to get a swim in in the afternoon, was to work at home in the evening, as all of the Justices of our Court, of course, did that before they moved into the new Court building in 1935.

And I put in a good number of hours at home. There is a—well, I should not be explaining to you what the life of a Chief Justice is since you have been one and I have not. But as you know, part of the work of any appellate judge is working with law clerks, working with one's colleagues, sitting on the bench hearing arguments, going to conferences.

But there is a fair amount of the work that you have to do by yourself. The staffers cannot help you, the law clerks cannot help you. You have to read briefs. You have to read circulating drafts of opinions. You have to read either petitions for certiorari or memos summarizing. And that is work that not only can be just as well done at home, I have found, but better done at home when you are not interrupted the way you are in your office.

Senator **Heflin**. In your routine of taking daily exercise—of course, we understand you have had a back operation and you feel it is beneficial and helpful to you to spend a portion of your day taking exercise.

Justice **Rehnquist**. Yes; I do.

Senator **Heflin**. What I suppose I am getting to is that the role of Chief Justice may entail more work, more requirements than an Associate Justice, such as maybe seeing more people, the relationship of administrative building superintendent or the sergeant-at-arms or whoever it may be, the director of the Federal Judicial Center—all of these things—of additional duties that are required.

Is your routine such that, in having followed it for a period of time, so firm that it would not be flexible for you to change in such a manner? I think what I am getting at is whether the routine that you have developed for your daily life is such that it would interfere with your role as a Chief Justice?

Justice **Rehnquist**. I do not believe so, Senator. I am, of course, aware of the fact that the Associate Justice's role is pretty well deciding the business that comes before the Court. The Chief Justice has a good deal more extensive responsibilities that would involve seeing more people, just as you point out, working with groups completely outside the Court. And whereas I certainly do not propose to give up my fairly regular swimming, which I think is essential to feeling fit, obviously I am going to have to tailor and remodel a lot of the way I handle the job of Associate Justice and simply spend more time in the building. There is no question.

Senator **Heflin**. Well, now, I think Senator Simon has asked you basically about your health. You had a back operation and had a disc removed, as I understand it, probably about 1969 or 1970, and you probably have had some problems at times with it. I never have known many disc operations that were completely successful.

But, basically, do you feel that you are able to do the task of a Chief Justice and that your health would permit you to perform the role of the Chief Justice?

Justice **Rehnquist**. Yes, I do, Senator. I certainly would not have accepted the nomination had I thought otherwise.

Senator **Heflin**. All right, sir. You have been the Justice assigned to the ninth circuit, I believe, which is the Western. And there are many of us in the Congress that are concerned about whether or not the ninth circuit has become too big, too cumbersome. I believe, what is it now, 28 judges in that circuit, and they have attempted, instead of having en banc of all of those judges, a procedure by which it is divided into a group that does the function of an en banc proceedings.

Now, they are proud of that. Judge Browning and Judge Clifford Wallace, and some of them out there tell me that this is working well. They are always trying to encourage me to get out and view it, which I would like to do sometime but it always comes in the middle of the week when we have duties here.

But do you feel, from the viewpoint of your observations, that improvements can be made to the situation pertaining to the overall operation of the ninth circuit?

Justice **Rehnquist**. Senator, I would say that in my mind the jury is out on whether a court that big will ever work. I think no one has labored more indefatigably to see that it did than Chief Judge Browning, and I think he is a real student of judicial administration, and Judge Wallace along with him, as you mentioned.

I do not know how you could get a better production out of that situation than they have done. Whether or not it ultimately will work, I certainly do not profess to know. I think the judges of the ninth circuit and people attending the ninth circuit conference say they believe it is working. And since we have so many problems with court of appeals, conflicts of circuits and that sort of thing, I think one of Judge Browning's arguments in favor of keeping the ninth circuit the way it is, as I understand it, is that if you split the circuit, that is just one more court that is going to furnish conflicts that need to be resolved, either by the Supreme Court or the National Court of Appeals.

So, I would definitely feel that—and I daresay the judges of the ninth circuit feel that way—certainly it should be observed; but if they can do it successfully, more power to them.

Senator HEFLIN. Let me ask you this: Do you remember when you started wearing glasses?

Justice REHNQUIST. I think I started wearing glasses off and on, you know, sometime in probably—I think maybe grade school, perhaps high school.

Senator HEFLIN. Did you wear glasses, say, from after you finished law school all of the time or just on occasion?

Justice REHNQUIST. I switched, as I recall, from wearing glasses part of the time to all the time right after I moved to Phoenix in 1953, more or less out of pride. I had not wanted to wear glasses because I obviously thought I looked better without them. But then I moved to a new city where my wife and I knew only one other person at the time we moved there, and the idea if you are going to be successful and get around and meet people. And I realized I was meeting people and then snubbing them on the streets the next day. [Laughter.]

That is when I started wearing glasses all the time.

Senator HEFLIN. To tell you the truth, I cannot remember when I started wearing them. But anyway, I think that helps clear up a point.

Let me ask you this: Have you in your judicial writings ever written an opinion that involved laches?

Justice REHNQUIST. I recall one case, and I am not sure you would describe it as laches. It was a case called United States against Nevada that was about 3 or 4 years ago. And it was a question of the Government being prevented from opening up a decree that had been entered in a district court proceeding out in Nevada, oh, in the 1940's, I think.

I do not know whether, thinking back, I cannot remember whether it turned on laches or not, but that is as close as anything I remember.

The CHAIRMAN. Senator, your time is up.

The distinguished Senator from Utah.

Senator HATCH. Give me just a second, Mr. Chairman.

The CHAIRMAN. Do you want me to pass on?

Senator HATCH. No; I would like to bring up a couple of things here.

I notice that *Plessy* v. *Ferguson* keeps coming up. I thought you more than disposed of that yesterday. And I personally am somewhat reluctant to bring up matters that have occurred 34 or 35 years ago as has been done here.

Nonetheless, we continue to hear about these ancient events as though they are important today.

I would like to ask a few questions.

In 1952, your coclerk, Mr. Cronson, now an international lawyer, was the only other person with firsthand knowledge of the genesis of the memo you wrote on the segregation cases. And Mr. Cronson wrote another memo on the same case, is that correct?

Justice REHNQUIST. He wrote another memo on the same case, I know from now reviewing the Jackson memos. I cannot say whether it was earlier or later.

Senator HATCH. Is it not common for Supreme Court Justices to seek varying views from their law clerks?

Justice REHNQUIST. I think Justice Jackson did.

Senator HATCH. And was it not common for him to ask one clerk to write one particular side and another clerk to write another particular side?

Justice REHNQUIST. It certainly happened in some cases, Senator.

Senator HATCH. And this was one of the cases where it happened?

Justice REHNQUIST. Oh, I see now that it was. I do not know that I would have remembered it just from reading my memo by itself.

Senator HATCH. Now, according to your coclerk, Mr. Cronson, however, the views in the memorandum about *Plessy* v. *Ferguson* were not your own views, is that right?

Justice REHNQUIST. He said that. I believe that he is correct in saying that for the reasons that I said in my 1971 letter to Senator Eastland.

His statement that it embodied a lot of his views, I cannot recall at this time whether it did or not.

Senator HATCH. OK. He said in an article in 1971, and as I understand it, he has reaffirmed recently to reporters that "Both of us personally thought Plessy was wrong."

I understand you cannot speak for your coclerk, but is that consistent with your understanding?

Justice REHNQUIST. It is certainly consistent with my recollection.

Senator HATCH. Now, I hesitate to ask again, but this piece of history seems to be important to some of my colleagues who love the past.

Was Plessy a correct interpretation of the 14th amendment, in your opinion?

Justice REHNQUIST. I did not think it was, no.

Senator HATCH. You did not think it was then, and I take it you do not think it is today?

Justice REHNQUIST. Oh, certainly not.

Senator HATCH. That is right.

It is significant that the only other person with a firsthand knowledge about this segregation memorandum agrees with your account that it was drafted at Justice Jackson's request to reflect a particular point of view. That was Mr. Cronson.

It is not a reflection of your own views according to the only other person who had firsthand knowledge or recollection of the memorandum. In fact, your coclerk has stated that he collaborated with you on the drafting of the memo and that it may have been more a product of his own than of your own. That answers that question.

We have heard allusions that you may not be as sensitive to women's rights as some members of this committee think you should be. We all think you should be sensitive to women's rights, and you have said that you are.

It seems to me that you were the author of the last term's leading women's rights case. And that is the case of Meritor Savings Bank. Is that correct?

Justice REHNQUIST. Yes; it is, Senator.

Senator **Hatch**. In that case, you led the Court in stating that an employer may be liable for sex harassment in the workplace. Is that correct?

Justice **Rehnquist**. Yes; it is.

Senator **Hatch**. You also voted with the majority in the case of *Roberts* v. *Jaycees*. Is that correct?

Justice **Rehnquist**. Yes; I did.

Senator **Hatch**. In that case, it was decided that the States may prohibit discrimination by a club. That is the Jaycees in that particular case. Is that correct?

Justice **Rehnquist**. Yes; I think it is.

Senator **Hatch**. You were in the majority on that case. In fact, I have for the record a lengthy list of cases where you have voted for women and minorities. I have compiled over 27 cases.

That is true, is it not? There are many cases where you have voted for women and minorities.

Justice **Rehnquist**. There certainly are. I cannot vouch for the exact number.

Senator **Hatch**. Let me also put a memorandum into the record of the 34 cases where Mr. Justice Rehnquist, as stated, has backed, and restated the *Brown* decision as well.

The **Chairman**. You are not asking that all the opinions be put in, are you?

Senator **Hatch**. No; just a listing of the cases.

The **Chairman**. Without objection, so ordered.

[Information follows:]

CASES WHERE JUSTICE REHNQUIST HAS CITED BROWN v. BOARD OF EDUCATION IN SUPPORT OF A PROPOSITION

1. Thornburgh, Governor of Pennsylvania, et al. v. American College of Obstetricians and Gynecologists, et al., No. 84-495, Supreme Court of the United States, 106 S. Ct. 2169, June 11, 1986.

2. Wygant, et al. v. Jackson Board of Education, et al., No. 84-1340, Supreme Court of the United States, 90 L. Ed. 2d 260; 106 S. Ct. 1842, May 19, 1986.

3. Batson v. Kentucky, No. 84-6263, Supreme Court of the United States, 90 L. Ed. 2d 69; 106 S. Ct. 1717, April 30, 1986.

4. The Lorain Journal Co., et al. v. Michael Milkovich, Sr., No. 84-1731, Supreme Court of the United States, 88 L. Ed. 2d 305; 106 S. Ct. 322, November 4, 1985.

5. Allen v. Wright Er Al., No. 81-757, Supreme Court of the United States, 468 U.S. 737; 82 L. Ed. 2d 556; 52 U.S.L.W. 5110; 104 S. Ct. 3315; 84-2 U.S. Tax Cas. (CCH) P9611, July 3, 1984 * * Together with No. 81-970, Regan, Secretary of the Treasury, et al. v. Wright, et al., also on certiorari to the same court.

6. Heckler, Secretary of Health and Human Services v. Mathews, et al., No. 82-1050, Supreme Court of the United States, 465 U.S. 728; 79 L. Ed. 2d 646; 52 U.S.L.W. 4333; 104 S. Ct. 1387; 33 Empl. Prac. Dec. (CCH) P34, 190, March 5, 1984.

7. Rogers, et al. v. Lodge, et al., No. 80-2100, Supreme Court of the United States, 458 U.S. 613; 102 S. Ct. 3272; 73 L. Ed. 2d 1012; 50 U.S.L.W. 5041, July 1, 1982.

8. Toll, President, University of Maryland, et al. v. Moreno, et al., No. 80-2178, Supreme Court of the United States, 458 U.S. 1; 73 L. Ed. 2d 563; 50 U.S.L.W. 4880; 102 S. Ct. 2977, June 28, 1982.

9. Board of Education, Island Trees Union Free School District No. 26, et al. v. Pico, by his next friend, Pico, et al. No. 80-2043, Supreme Court of the United States, 457 U.S. 853; 73 L. Ed. 2d 435; 102 S. Ct. 2799, June 25, 1982.

10. Lugar v. Edmondson Oil Co., Inc., et al., No. 80-1730, Supreme Court of the United States, 457 U.S. 922; 73 L. Ed. 2d 482; 102 S. Ct. 2744, June 25, 1982.

11. Fullilove, et al. v. Klutznick, Secretary of Commerce, et al., No. 78-1007, Supreme Court of the United States, 448 U.S. 23 Empl. Prac. Dec. (CCH) P31, 026, July 2, 1980.

12. Harris, Secretary of Health and Human Services v. McRae, et. al., No. 79-1268, Supreme Court of the United States, 448 U.S. 297, June 30, 1980; Petititon for Rehearing Denied September 17, 1981.

13. Carlson, Director, Federal Bureau of Prisons, et al. v. Green, Administratrix, No. 78-1261, Supreme Court of the United States, 446 U.S. 14, April 22, 1980.

14. Estes, et al. v. Metropolitan Branches of the Dallas NAACP, et al., No. 78-253, Supreme Court of the United States, 444 U.S. 437, January 21, 1980 * * Together with No. 78-282, Curry, et. al. v. Metropolitan Branches of the Dallas NAACP, et al.; and No. 78-283, Brinegar, et al. v. Metropolitan Branches of the Dallas NAACP, et al., also on certiorari to the same court.

15. Gannett Co., Inc. v. Depasquale, County Court Judge of Senaca County, N.Y., et al., No. 77-1301, Supreme Court of the United States, 443 U.S. 368, July 2, 1979, Decided.

16. Columbus Board of Education, et al. v. Penick, et al., No. 78-610, Supreme Court of the United States, 443 U.S. 449, July 2, 1979, Decided; Petition for Rehearing Denied October 1, 1979.

17. Dayton Board of Education, et al. v. Brinkman, et al., No. 78-627, Supreme Court of the United States, 443 U.S. 526; July 2, 1979, Decided; Petition for Rehearing Denied October 1, 1979.

18. Personnel Administrator of Massachusetts, et al. v. Feeney, No. 78-233, Supreme Court of the United States, 442 U.S. 256; 19 Empl. Prac. Dec. (CCH) P9240; 19 Fair Empl. Prac. Cas. (BNA) 1377, June 5, 1979.

19. Ambach, Commissioner of Education of the State of New York, et al. v. Norwick, et al., No. 76-808, Supreme Court of the United States, 441 U.S. 68; 19 Empl. Prac. Dec. (CCH) P9122; 19 Fair Empl. Prac. Cas (BNA) 467, April 17, 1979.

20. Regents of the University of California v. Bakke, Supreme Court of the United States, 438 U.S. 165; 17 Fair Empl. Prac. Cas. (BNA) 1000; 17 Empl. Prac. Dec. (CCH) P8402, June 28, 1978.

21. Milliken, Governor of Michigan, et al. v. Bradley, et al., No. 76-447, Supreme Court of the United States, 433 U.S. 267, June 27, 1977; as amended.

22. Maher, Commissioner of Social Services of Connecticut v. Roe, et al., No. 75-1440, Supreme Court of the United States 432 U.S. 464, June 20, 1977; as amended.

23. Ingraham, et al. v. Wright, et al., No. 75-6527, Supreme Court of the United States, 430 U.S. 651, April 19, 1977; as amended.

24. Austin Independent School District v. United States, No. 76-200. Supreme Court of the United States, 429 U.S. 990, December 6, 1976.

25. Pasadena City Board of Education, et al. v. Spangler, et al., No. 75-164, Supreme Courlt of the United States, 427 U.S. 424, June 28, 1976.

26. Rizzo, Mayor of Philadelphia, et al. v. Goode, et al., No. 74-942, Supreme Courlt of the United States, 423 U.S. 362, January 21, 1976.

27. Buchanan, et al. v. Evans, et al., No. 74-1418, Supreme Court of the United States, 423 U.S. 963, November 17, 1975.

28. Milliken, Governor of Michigan, et al. v. Bradley, et al., No. 73-434, Supreme Cort of the United States, 418 U.S. 717, July 25, 1974, * Decided * Together with No. 73-435, Allen Park Public Schools, et al. v. Bradley, et al., and No. 73-436, Grosse Pointe Public School System v. Bradley, et. al., also on certiorari to the same court.

29. Gilmore, et al. v. City of Montgomery, Alabama, et al., No. 172-1517, Supreme Court of the United States, 417 U.S. 556, June 17, 1974, Decided

30. Norwood, et al., v. Harrison, et al., No. 72-77, Supreme Court of the United States, 414 U.S. 455, June 25, 1973, Decided

31. Keyes et. al. v. School District No. 1, Denver, Colorado, et al., No. 71-507, Supreme Court of the United States, 413 U.S. 189, June 21, 1973, Decided

32. Lemon, et. al. v. Kurtzman, Superintendent of Public Instruction of Pennsylvania, et al., No. 71-1470, Supreme Court of the United States, 411 U.S. 192, April 2, 1973, Decided

33. San Antonio Independent School District, et al. v, Rodriguez, et. al., No. 71-1332, Supreme Courlt of the United States, 411 U.S. 1, March 21, 1973, Decided

34. Wright, et al. v. Council of the City of Emporia, et al., No. 70-188, Supreme Court of the United States, 407 U.S. 451; 33 L. Ed. 2d 51; 92 S. Ct. 2196, June 22, 1972, Decided

Senator **Hatch**. With regard to Bob Jones University, there are those who argue that the University should not have lost its 501(c)(3) tax exemption because it was a university operated pursuant to a sincerely held religious belief. That is a constitutional argument that cannot be ignored in that type of a case.

But that was not the reason you decided that case. And you were the sole dissenter in that case.

As I understand it, the larger context of the issue involved the separation of powers doctrine. And regardless of how much you desired to see such schools deprived of their tax exemptions one way or the other you believed that Congress was the only branch of Government empowered to do so and that the Court should not unilaterally make that decision. Am I correct?

Justice **Rehnquist**. Yes; it was interpreting an act of Congress, and the question was whether or not the exemption was to be denied. And I would add in supplementing what you have already said that, in my opinion in that case, I specifically rejected the constitutional argument advanced by Bob Jones.

Senator **Hatch**. You are saying the section 1 religious freedom argument?

Justice **Rehnquist**. Yes.

Senator **Hatch**. What you are saying is that you argued a legitimate position that if Congress wanted to take away the exemption, Congress would have had the power to do so. Is that correct?

Justice **Rehnquist**. Well, no question of that.

Senator **Hatch**. I presume that if all 535 Members of Congress who are always saying that they are for civil rights, had wanted to revoke the 501(c)(3) tax exemption that the Bob Jones University had and was operating pursuant to, and had the guts to do it, they could have done it by statute. And Bob Jones University took that to court.

Had it arrived up to the level of the Supreme Court, you would have voted against Bob Jones and sustained the right of the Congress to have done so?

Justice **Rehnquist**. I think that is clear from what I wrote at that time.

Senator **Hatch**. That is a fairly principled constitutional position, one which you should be given credit for rather than condemned for on the basis of lacking sensitivity to civil rights. That that must be brought out.

It is one thing to lift excerpts from some of these cases. It is another thing to talk about what they really mean and how important some of these constitutional issues really are. In particular, the separation of powers doctrine of the Constitution, and the right of Congress to do certain things or not to do certain things which you have specific beliefs about.

Mr. Chairman, I reserve the balance of my time.

The **Chairman**. If you will take the chair.

Senator **Hatch** [presiding]. Senator Biden, we will turn to you at this time.

Senator Biden.

Senator **Biden**. We have a vote on, but I will start if that is OK. But I am going to have to leave. As a matter of fact, rather than do that, why do I not go and vote and come back, because I have a series of questions on the 14th amendment?

Senator HATCH. Why don't you stay because Senator Thurmond has gone over to vote. I will stay as long as I can.

Senator BIDEN. I am going to go vote because what is going to happen is I am going to start and get partway into it, because it relates to the Judge's philosophy, it is going to get lost in the transition. And so I will come back.

Senator HATCH. Senator Metzenbaum.

Senator METZENBAUM. I think we all should go. But I will be back in 5 minutes.

Senator HATCH. Let me take a little bit more time here until Senator Thurmond gets back. You have been asked a number of questions that perhaps should be clarified.

We heard charges in the last day or so that you might be too extreme. One example raised was your dissent in the *Jaffrey* v. *Wallace* silent prayer case.

It might put this case in context to realize that Justice White and Mr. Justice Burger also dissented in that case.

Justice REHNQUIST. Yes, they did.

Senator HATCH. It was not just yourself.

More importantly, 12 members of this committee have dissented in the same case because my constitutional amendment proposal would reverse Jaffrey and permit silent prayer reflection or reflections. It was approved by this committee on a 12 to 6 vote on October 3, 1985.

Are you embarrassed to find yourself in agreement with two thirds of this Judiciary Committee?

Justice REHNQUIST. Not at all, Senator.

Senator HATCH. Lest some think that the committee may have taken its action for a different reason than the Justice Rehnquist, I would like to read from the committee report. It makes a fairly decent case as to why your position is not extreme. Let me give you some illustrations.

One of the excerpts says, "Perhaps most important to the first Congress, it represented a clear prohibition against any single national religion." At the same time, the language left latitude for Government and generally to religion.

Now, if you go on we had all kinds of testimony before the Court as to how important the silent prayer experience may be. And what the report says is, "This contest with the silent prayer experience in which every child could be accommodated every day in the recitation of a personally meaningful prayer." Professor Malbin said, "Silent prayer is an important part of almost every religion." You could go on.

The report itself, which is filed with the Senate with regard to Senate Joint Resolution 2, is, of course, very important. And it says:

> In the view of the proponents of the Senate Joint Resolution 2, the present amendment is necessary to restore the historic meaning of the first amendment sharply altered by the Court's decision in *Jaffrey*. The laws of at least 23 States were apparently overturned by the Court's decision in this case. Historically, the establishment clause had been understood primarily to prohibit the State from establishing any official church or from preferring any particular church or denomination as a matter of general policy.

This very committee, with a very distinct majority vote, basically supported your position in the *Jaffrey* case.

I would also point out that many of the same views found in your dissent in the *Jaffrey* case command now a majority of the Supreme Court. Take, for instance, the *Lynch* v. *Donnelley* case on the display of the creche; in the *Mueller* v. *Allen* case on tuition tax credits; in the *Marsh* case on chaplains in legislature. Those all follow your reasoning.

Justice REHNQUIST. Yes, I wrote Mueller against Allen.

Senator HATCH. That is right.

In other words, your reasoning in that case for which you have been called extreme is now the dominant reasoning on the Court except in the matter of silent prayer.

Justice REHNQUIST. Yes. Of course, Wallace against Jaffrey came after Mueller against Allen, but certainly there are very definitely common threads in the reasoning of them.

Senator HATCH. I do not mean to suggest even that the reasoning was identical, but I am saying that certainly these cases accommodated our religious heritage and our religious traditions without finding a conflict with the first amendment. I just wanted to bring that out.

And in each of these cases, the *Lynch* case, the *Mueller* case, the *Marsh* case, you were in the majority. And you wrote the *Mueller* case.

Is it the view of the majority of the Court that the First Amendment does not forbid many of the Nation's long-standing religious traditions?

Justice REHNQUIST. That the first amendment does not forbid any of the Nation's long-standing religious traditions?

Senator HATCH. Yes.

Justice REHNQUIST. Similar to the creche perhaps?

Senator HATCH. Yes.

Justice REHNQUIST. I would not want to speak for any of my colleagues on that, Senator. These cases, although in theory they are very logical and analytical, often tend to turn on the facts very much.

Certainly if something were identical to the creche or very close to it, I would think we would get the same five to four division that we did in that case.

Senator HATCH. Thank you.

I will conclude by saying that that is also the view of at least 12 out of the 18 members of this committee. And what you have been labeled as extreme for is something that a majority of this committee supports.

Justice REHNQUIST. We are all extremists together then. [Laughter.]

Senator HATCH. That is a very good point.

At least in the eyes of the minority of six, or at least maybe the minority of two or three of the committee.

I will have to go vote. We will recess until Senator Thurmond gets back and then we will reconvene the hearing.

[Recess.]

The CHAIRMAN. The committee will come to order.

We have now completed round three. We are going to round four.

The senior Senator from Ohio.

Senator METZENBAUM. You think you can go 15 rounds, Mr. Chairman?

The CHAIRMAN. I would hope not.

Senator METZENBAUM. Mr. Justice, 200 years ago Thomas Jefferson praised the idea of a wall between church and state.

You expressed reverence for the first amendment, quote, which declared that their legislature should make no law respecting an establishment of religion or prohibiting the free exercise thereof, thus building a wall of separation between church and state, end of quote.

If you had lived at that time, would you and Thomas Jefferson have been in disagreement?

Justice REHNQUIST. It is hard to put oneself back in that time, Senator, but I am not sure how I would have thought about that.

It is a noble sentiment, nobly expressed. Having seen the cases that have come before us recently where, for instance, there have been efforts by student governments to recognize the fact that parochial schools do a great deal of the education of people and take burdens off public schools, in an effort to somehow recompense that by allowing, for example, tuition credits to parents whose children attend parochial schools, and I am not sure that I—with the benefit of hindsight—I would completely agree that there should be a wall of separation between church and state of the kind that would prohibit that sort of aid.

Senator METZENBAUM. Justice Black said that one problem with governmental involvement with religion was that the involvement tended to coerce religious minorities to conform.

Do you see that as a problem?

Justice REHNQUIST. Certainly any effort to coerce religious minorities to conform, I think, is a definite problem.

Senator METZENBAUM. Let me turn to a different subject having to do with race discrimination.

One of the most troubling areas of your record is in your position on laws against race discrimination. There appears to be a clear pattern in your statements and positions on this issue.

What is troubling, Mr. Justice, is that one can identify this pattern from the time you were a clerk for Justice Jackson until you decided the affirmative action cases a few weeks ago.

The pattern seems to be, if you are a member of a minority fighting discrimination, William Rehnquist is likely to be against you.

Now there are some exceptions, I know. But I will not go back into the memo having to do with Plessy against Ferguson. But there is a statement in one of your memos as a clerk that I would like to address myself to, skipping over the Jackson memo.

Said you: It is about time the Court faced the fact that the white people in the South do not like the colored people. The Constitution restrains them from effecting this dislike through State action. But it most assuredly did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head.

Are those still your views?

Justice **Rehnquist**. Senator Metzenbaum, if you look more thoroughly at the memo that you are talking about, which I believe was in one of my memos in Terry against Adams, it starts out with the statement—and it is signed by me, WHR; it is to Justice Jackson—if you are going to dissent, I should think you might combine the ideas which you expressed last week with an attack on the reasoning of the two quote majority opinions, close quote.

And then No. 1 below that is Justice Black, it says Black. No. 2 is FF, which certainly stood for Felix Frankfurter, and then, No. 3, your ideas, dash, dash, the Constitution does not prevent the majority from banding together, nor does it taint success in the effort. It is about time the Court faced the fact——

So that I think the memo read in context gives a somewhat different impression. Though I certainly shared the view at that time that in order for something to be unconstitutional it had to involve State action; and I continue to share that view, and I think it remains the law.

Senator **Metzenbaum**. And so that would continue to be your view?

Justice **Rehnquist**. On the law of the matter, yes.

The **Chairman**. Would you like that to be included in the record?

Justice **Rehnquist**. Unless you want it, Mr. Chairman, or Senator Metzenbaum does, I do not have any particular need for it.

The **Chairman**. Without objection, we will include it in the record.

Senator **Metzenbaum**. Well, then, I did not want to clutter the record. But if we are to include that memo, I guess we had better include the memo on the *Jackson* case as well. I think there will be other memos also.

The **Chairman**. Without objection, the Jackson memo will be included.

Senator **Metzenbaum**. There is another statement in one of your clerk memos, this is in connection with the lawsuit challenging the Jaybird Democratic Club in Texas.

That club did not admit blacks. For all practical purposes, it chose the Democratic nominees for the county. On its face, that sounds to me like blatant discrimination and blatant political discrimination, as a matter of fact.

You, as a clerk, said: I take a dim view of this pathological search for discrimination a la Walter White, Black, Douglas, Rodell, et cetera.

What did you mean by pathological search for discrimination?

Justice **Rehnquist**. I think it would have been much more accurate to say, unlawful discrimination. Because there was obviously blatant discrimination in that case, just as you put it.

I think what I meant was that a desire which overbore every other consideration of law to find State action where there might have been very good reasons for thinking it was a purely private act.

Senator **Metzenbaum**. But you took a dim view of that search for discrimination, as if to say that you resent the fact that people are always looking for discrimination and why cannot people get off this kick.

Justice **Rehnquist**. The memo certainly is subject to being fairly interpreted that way. But I think a more accurate statement of my views would be that the idea that the overriding element was the effort to bring everything within the rubric of State action, even though perhaps it could not justifiably be done.

Senator **Metzenbaum**. Is it not the fact that at that time custom and segregation were pretty much the same, that it was the custom to segregate—that you did not have to have a pathological search for discrimination in order to find it because it was such a reality of life?

Justice **Rehnquist**. I think it probably was.

Senator **Metzenbaum**. Mr. Chairman—bad news, Mr. Chairman, another rollcall.

Mr. Chairman, I at this point will introduce into the record a copy of that memo as well.

The **Chairman**. Without objection.

[The memos follow:]

10/13 – Held　　11/14 – Gr.
10/18 "
10/25 "
11/8 "

159 | 651

✓
No. 52 9 Terry v. Adams

Cert to CA 5　　Hutcheson, Holmes, Strum　　unan

Ptrs brought an action for decl relief and for inj against rspdt in USDC Tex, claiming that they were being denied the right to vote in a poll of the "Jaybird Democratic Party" of Fort Bend, Tex, in violation of the equal protection of the laws. The DC granted a decl J but denied the inj; rspdts appealed to CA 5, which reversed the decl J.

Ptrs are colored; they claim that the Jaybird Democratic Club, which admits only whites, is in effect the Democratic Party of Fort Bend County. Though it takes its vote at a time different from that specified for political primaries in the Texas Code, and though it has been in existance since 1889, they insist that these distinctions are immaterial. They point to the fact that the person who wins the Jaybird Poll almost always receives the endorsement of the Democratic party, though in a separate proceeding. The rspdts, on the other hand argue that their organization is sufficiently detached from any of the state's political processes so as to be without the principle of Smith v. Allwright, 321 US 649.

CA 5 felt that this was the place to draw the line. Conceding the rule to be established that any state sanction of discrimination is a denial of equal perotection, and that the primary may be part of the state election machinery even though not expressly governed by state law (see Rice v. Elmore, 165 F.2d 387, cert den 333 US, of which CA 5 approves), nevertheless where there is neither a legal nor a close factual tie in between an organization and the state sanctioned electoral processes, it is not state action. CA 5 says the procedure is the equivalent of polling the white voters, which anyone would have a right to do. The fact that the Democratic convention almost invariably adopts the results of the poll is merely because that organization thinks it desirable to do so.

CA 5's distinction may appeal, or it may not. I have a hard time being detached about this case, because several of the Rodell school of thought among the clerks began screaming as soon as they saw this that "Now we can show those damn southerners", etc. I take a dim view of this pathological search for discrimination, a la Walter White, Black, Douglas, Rodell, etc, and as result I now have something of a mental block against the case. For that reason, in spite of doubts as to its tramscending importance in the absence of a conflict among circuits, and notwithstanding my feeling that the decision is probably right to a lawyer, rather than a crusader, I shall over-compensate and recommen a grant.

GRANT　　whr

For deny.	For grant	Moot
Vinson	Black	F.F.
Jackson	Reed	
Minton	Burton	

Re: Opinions of Black and FF in Terry v. Adams

If you are going to dissent, I should think you might combine the ideas which you expressed last week with an attack on the reasoning of the two "majority opinions."

(1) Black--simplyassumes the whole point in issue. The 15th Amendment requires state action, and certainly Congress under its power to "enforce" the amendment cannot drastically enlarge its scope. Yet the Black opinion utterly fails to face the problem of state action. He says rather that the effect of the Fifteenth Amendment is to prevent the states from discriminating against Negroes in official elections; the result here is to accomplis that result "by indirection;" therefore that result is bad. Surely it should not take a quotation from Mr Justice Holmes to establish the proposition that,especially in the field of constitutional law, fifferences will be ones of degree and the point at which the constitutional result changes will not be marked by any shafp turn in the road. Surely the Judtices of this Court do not sit here to ruthlessly frustrate results which they consider undesirable, regardless of the wording of the constitution.

(2) FF--places the weight of the decision on the rather skimpy support to be found in his discovery of"state action": the county election officials voted in the Jaybird primary! In the first place, they voted not in their capactly as election officials, but as private citizens. Secondly, it was not their voting which effected the discrimination; it was the previously adopted rules, with which they may have had nothing to do. Thirdly, if this is the vice why not simply e njoin the officials from voting? When one must strain this hard to reach a result, the chances are that something is the matter with the result--as in Lutwak

(3) Your ideas--the constitution does not prevent the majority from banding together, nor does it attaint success in the effort. It is about time the Court faced the fact that the white people on the South don't like the colored people; the constitution restrains them from effecting this dislike thru state action, but it most assurely did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head. To the extent that this decision advances the frontier of state action and "social gain", it pushes back the feontier of freedom of association and majority rule. Liberals should be the first to realize, after the past twenty years, that it does not do to push blindly through towards one constitutional goal without paying attention to other equally ~~desirb~~ desirable values that are being trampled on in the process.

This is a position that I am sure ought to be stated; but if stated by Vinson, Minton, or Reed it just won't sound the same way as if you state it

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A Random Thought on the Segregation Cases

One-hundred fifty years ago this Court held that it was the ultimate judge of the restrictions which the Constitution imposed on the various branches of the national and state government. Marbury v. Madison. This was presumably on the basis that there are standards to be applied other than the personal predilections of the Justices.

As applied to questions of inter-state or state-federal relations, as well as to inter-departmental disputes within the federal government, this doctrine of judicial review has worked well. Where theoretically co-ordinate bodies of government are disputing, the Court is well suited to its role as arbiter. This is because these problems involve much less emotionally charged subject matter than do those discussed below. In effect, they determine the skeletal relations of the governments to each other without influencing the substantive business of those governments.

As applied to relations between the individual and the state, the system has worked much less well. The Constitution, of course, deals with indivudal rights, particularly in the First Ten and the Fourteenth Amendments. But as I read the history of this Court, it has seldom been out of hot water when attempting to interpret these individual rights. Fletcher v. Peck, in 1810, represented an attempt by Chief Justice Marshall to extend the protection of the contract clause to infant business. Scott v. Sanford was the result of Taney's effort to protect slaveholders from legislative interference.

After the Civil War, business interest came to dominate the Court, and they in turn ventured into the deep water of protecting certain types of individuals against legislative interference. Championed first by Field, then by Peckham and Brewer, the high water mark of the trend in protecting corporations against legislative influence was probably Lochner v. NY. To the majority opinion in that case, Holmes replied that the Fourteenth Amendment did not enact Herbert Spencer's Social Statics. Other cases coming later in a similar vein were Adkins v. Children's Hospital, Hammer v. Dagenhart, Tyson v. Banton, Ribnik v. McBride. But eventually the Court called a halt to this reading of its own economic views into the Constitution. Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.

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Senator **Metzenbaum**. In those days as a clerk you were just out of law school. But the pattern continues.

Some years later the record shows you strongly opposed an antidiscrimination ordinance in Phoenix. In a letter to the editor of the Arizona Republic you wrote, and I quote:

> The ordinance summarily does away with a historic right of a drugstore, lunch counter, or theater to choose his own customers. It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this.

If I read that correctly, you were putting property rights, the right of a drugstore owner or lunch counter owner, to choose its own customers over the right of those customers to be treated equally.

Is that correct?

Justice **Rehnquist**. At that time I was, Senator; yes.

Senator **Metzenbaum**. And have you reversed your views on that?

Justice **Rehnquist**. Yes, I have.

Senator **Metzenbaum**. And have there been any cases in which you have reversed your position on that?

Justice **Rehnquist**. Well, there have been cases in which I certainly voted to enforce antidiscrimination ordinances, statutes passed by Congress.

There was a case, I think *Tillman* v. *Wheatenhaven*, that came up shortly after I went on the Court, where I think the opinion of the Court was unanimous, saying that Congress had prohibited discrimination—there was an exception for private clubs, and saying that particular outfit was not a private club. And I joined what I think was an unanimous opinion.

The **Chairman**. Your time is up, sir.

The distinguished Senator from Alabama. And incidentally, have you voted on this vote yet?

Senator **Heflin**. No, but I only have one or two further questions. And I think I can wind it up in a couple of minutes.

Mr. Justice Rehnquist, on the questionnaire for judicial nominees that you filled out, the oath that is taken was before a Notary Public Edward H. Faircloth. You might want to look at that, a copy of that. It has Faircloth's name signed to where yours was, scratched through, and then your signature above it, and then of course his, under the notary.

Would you give us an explanation of what occurred pertaining to that?

Justice **Rehnquist**. Either he or I, and it may well have been me, had picked the wrong space for the name to be printed. And I think actually my name should have been printed or typed in the first—or perhaps below it.

But at any rate, he signed where I should have signed. He also signed as a notary. And then we crossed out his name and put my signature in above it.

Senator **Heflin**. Well, in the normal course of events, when one gives an oath to a Notary Public or someone else, the affiant usually signs and then the Notary Public. But I suppose you had already given your oath to it, and this was just perfunctory as to the signature afterward.

Justice **Rehnquist**. I thought it was a matter of form, Senator. Because, as you say, I had just made the oath.

Senator **Heflin**. All right.

Now, there have been suggestions, in order to try to present the needs of the judiciary, that the Chief Justice be called upon to appear before a joint session of Congress and make a state of the judiciary speech.

This has been discussed at various times in proposed legislation here, or as a proposed invitation.

I just wonder if you have any thoughts as to whether this would be helpful to the judiciary, or if there are any problems that you might see with it. It would be similar to the President's State of the Nation speech that, either yearly or every 2 years, the Chief Justice might be requested to come before a joint session of Congress and speak on the state of the judiciary.

Justice **Rehnquist**. If Congress would welcome such an address, I should think any Chief Justice, including me, if I am confirmed, would be delighted to have the opportunity to tell Congress some of the problems, some of the current situations, in the judiciary.

It is a very significant occasion when a joint session of Congress is convened. And there might be a feeling, I suppose, that only a President or something like that should get that degree of dignity.

Senator **Heflin**. Well, a number of States have done this. It has proven to be effective. It is an effective way for a coequal branch of Government to present its views and its needs to the other branches of Government, since it could be that the Cabinet could attend as well as the Members of Congress.

That is all the questions I have at this time.

The **Chairman**. The distinguished Senator from Ohio.

Senator **Metzenbaum**. About the same time that you wrote that letter, you spoke out against efforts to integrate the schools in Phoenix.

You wrote: I think many would feel that we are no more dedicated to an integrated than we are to a segregated society.

Now that is truly a shocking statement. And I think here we are not dealing with what the Constitution says or does not say. We are talking about Justice Rehnquist as an individual, the one who is writing letters to the editor.

If you were a member of a minority, and you knew these statements by the nominee for Chief Justice of the Supreme Court, frankly, how would you feel about your chances of getting equal justice from the individual who had expressed such views as a private citizen?

Justice **Rehnquist**. If I had heard only what you said, Senator, I would have the gravest doubt. But I think if, again, there is a full sentence there which qualifies it. And it was in a context not of an effort to integrate the schools as such, because the schools in Phoenix have never been segregated by law except, I believe, for a high school system.

Do you have before you the full sentence, because I am not sure that I do?

Senator **Metzenbaum**. Well, we will get it. I have a quote from it here, but I will get it in just a minute and come back to it.

When you went to the Supreme Court in 1971, I think the minorities in this country had a perfectly understandable fear that you were an ideolog who was not going to protect their rights.

You testified in your 1971 hearings that you had changed your views about civil rights laws. You said: I think the ordinance worked very well in Phoenix. It was readily accepted, and I think I have come to realize since, more than I did at the time, the strong concern that minorities have for the recognition of these rights. I would not feel the same way today as I did about it then.

But in view of your record in the Court—and I know there are some cases having to do with State laws against discrimination, as distinguished from the rights of individuals under the Constitution—I know that in some of those you have ruled in favor of the minority—but how do you feel, or do you believe that minorities can feel more comfortable about your record on the Court in the area of race discrimination?

Because as you well know, a number of them are coming up here to testify that they are not comfortable, that they are concerned, and that they oppose—and they have said publicly that they oppose the nomination.

Justice **Rehnquist**. If I were being elevated to the Court for the first time, and yet somehow had the foresight that enabled me to see how I would vote for the next 15 years, I would say, I think, if I were a member of a minority, and not being a member of any minority it is very difficult for me to put myself in that position, but this person reads the Constitutional clauses upon which many of the lawsuits which would benefit minorities are based, more narrowly than some of the other people. I wish someone with a more expansive idea of the equal protection clause would be appointed.

But since I am already on the Court, and am simply being promoted to Chief Justice as opposed to Associate Justice, I would not think there is any reason to think that the way I see things for the next however many years it is I am permitted to serve if confirmed, would change from the way I have been doing it for the last 15 years.

The **Chairman**. We will have to stop now. We just have about 3½ minutes.

We have 43 witnesses, and we hope to get to you sometime today or tonight.

We will take a recess of 10 minutes.

[Brief recess.]

The **Chairman**. The committee will come to order.

The distinguished Senator from Pennsylvania.

Senator **Specter**. Thank you, Mr. Chairman.

Mr. Justice Rehnquist, when I last had an opportunity to question you, the subject discussed was the authority of Congress to, in effect, undercut *Marbury* v. *Madison,* by asserting its power to take away the jurisdiction of the Supreme Court of the United States in a particular matter. To illustrate, I specified a congressional effort to assert this power with respect to first amendment freedoms of speech, press, and assembly.

You stated that you thought, without making a final decision on it, that the Court's jurisdiction could not be undercut on constitutional issues.

Is that correct?

Justice REHNQUIST. I believe it is, Senator.

Senator SPECTER. Mr. Justice Rehnquist, may I assume that your view would be that Congress would lack the authority to deprive the Court of jurisdiction if it involved a genuine constitutional issue?

Justice REHNQUIST. Senator, I was reluctantly willing to answer your questions about the first amendment questions. I am a good deal more reluctant to venture an answer that would be any sort of a broader classification. In effect, I must say I am very much inclined to think that I best ought not.

Senator SPECTER. Well, what is the difference between Congress' seeking to undercut the jurisdiction of the Supreme Court of the United States with regard to the privilege against selfincrimination, and the right to counsel?

Justice REHNQUIST. Well, the difficulty with the question and the difficulty with my answering it, Senator, is that it is a totally abstract question as you propose it and as I would have to answer it. We do not know what context it comes up in. I have not had a chance to read whatever the framers might have said in connection with the article III, section 2, with such exceptions that Congress may provide.

It just gets us into an area that may come before the Court and that frankly is the kind that previous nominees, I think, have not answered.

Senator SPECTER. I thought that we had crossed that bridge, earlier today, with respect to your comments on the Whittaker appointment, in 1959, where you said, that you felt it was appropriate for the Senate to inquire and for a Supreme Court nominee to respond to questions on the meaning of due process of law and equal protection of the law.

Do you disagree with those views?

Justice REHNQUIST. I said in my—I do not know whether I said in 19—what was it, 59—that it was appropriate for the nominee to respond. I know I said it was appropriate for Congress to inquire.

But I was asked a similar question in my 1971 hearing, and I think I made the statement that I had no doubt at all that it was appropriate for Congress to inquire and to find out in every way, but that I had no idea of the extraordinary difficulties that that approach put the nominee in.

If I were coming before you as someone from private life without any record of participating and deciding cases, perhaps that is the only way you can get at it. But I have 15 years of decisions that should give an adequate indication, I would think, of my judicial philosophy to the extent I have one.

Senator SPECTER. Well, Mr. Justice Rehnquist, with all due respect, this issue has not been before the Court so I do not know from any statement which you have made where you stand on it.

When you say that you are trying to make a distinction as to what you said in 1959 are you saying that, at that time, there was a difference in what a Senator had a right to ask contrasted with what a nominee had a responsibility to answer?

Justice **Rehnquist**. I really did not go into in 1959 what the nominee's responsibility was. And I really had no idea what the problems confronting a nominee were then.

Senator **Specter**. Well, I must disagree with you, Mr. Justice Rehnquist.

Now, you may have a different view today, but what you said in 1959 was that the Senate did not do an adequate job in finding out where Justice Whittaker stood; that all they found out was where the money came from for his education, where he was born, where he practiced law. They did not know where he stood on equal protection of the law or due process of the law. And those were appropriate questions to be asked.

Now, I do not think you can realistically or reasonably say that there is a difference between what is reasonable to answer as opposed to what is reasonable to ask.

Justice **Rehnquist**. Well, I think I can, Senator. The questions can be directed to sources and places other than the nominee. And I think Justice Frankfurter took that position when he came before the committee, that his philosophy was a very legitimate inquiry, but he had written lots of things, and he was not going to answer any questions about it.

Senator **Specter**. Well, we may have a difference of opinion as to what is appropriate to ask and what is appropriate to answer. I have to say to you candidly that, speaking for myself, the issue of the authority of the Supreme Court is rockbed in my own thinking. When you talk about *Marbury* v. *Madison* and the basic authority of the Supreme Court of the United States as being the final arbiter, if a nominee does not believe in that, then I do not think a nominee believes in the very basic proposition of the Constitution.

It is on the same footing, as I see it, as to whether the Congress can undercut *Marbury* v. *Madison* and the authority of the Supreme Court of the United States by taking away jurisdiction. And that is why I have pressed it as hard as I have. You have to decide what you will respond to, and I have to decide for myself what that means to my vote in this committee and on the Senate floor.

Justice **Rehnquist**. Senator, I am sure it goes without saying that I respect your position. I think I understand your problem, and I hope that you understand mine too, that this is, as you say, there have been bills pending. I do not know what the contents of the bills were, but if we get away from the very rock bottom thing that we were talking about earlier to a different kind of bill, I simply think that I would be expressing an opinion on something that might come before the Court.

Senator **Specter**. Well, there is a great deal of authority, Mr. Justice Rehnquist, on Supreme Court Justices having taken positions on matters which come before the Court. There is authority that Justice Black, when he was a Senator, having inquired on an issue which he decided on the Supreme Court. Professor Frankfurter wrote extensively on matters which came before the Court. In your published opinion in *Laird* v. *Tatum,* in 1972 which I know you are familiar with, when the request had been made for you to step aside in the case, you made quite a number of references to situations where Justices had expressed themselves on matters which were very close to the issues which came before the Court, and that did not impede the ability of the Justice to make a decision on those matters.

Justice **Rehnquist**. But, Senator, I believe in those situations, the expressions had taken place when the people were not Justices and had not been nominated. They were then in some other function. And I think that is quite a difference.

Senator **Specter**. But the issue is very close, if what you are saying is that you do not want to answer questions in this proceeding which may undercut your ability to sit on a case which may come before the Court.

Justice **Rehnquist**. Senator, with all respect, I think I disagree with you. I think it would be one thing for me to get up in the Senate, if I were a Senator, and to say I think the proposed Court stripping bill is wholly unconstitutional, and then later vote on that case if I had been appointed to the Supreme Court in the meantime. But I do not think that is the same situation if someone who is a sitting Justice at the time the question is asked is nominated to be Chief Justice and asked please express your opinion on this case, that concedingly might come before you.

Senator **Specter**. Well, I disagree with you.

The **Chairman**. The Senator's time is up.

Senator **Specter**. I will come back with having disagreed with you, Mr. Justice Rehnquist.

The **Chairman**. The Senator from Massachusetts.

Senator **Kennedy**. Thank you, Mr. Chairman.

I just have really one area at this time that I would like to refocus on, if I could, Mr. Justice. And it is an area that you have been inquired of, I think, during the course of the first and perhaps the second round, but I have not had the chance to do so. And there are just some aspects of the memoranda that I would like to see if we cannot clarify.

I was on, as you remember, the Judiciary Committee during your previous hearings. Toward the closing of those hearings, there were certain charges that were made with regard to the voter harassment. And you responded to some of the questions and then, after the conclusion of the hearings, we discovered the Brown memorandum on school segregation. And on the floor of the Senate at that time, Senator Scott read into the record the response that Mr. Cronson had that would indicate that he felt that he contributed significantly to the memoranda for your initials. We have not gotten into how much he had to do with it. It appears that that memoranda had actually been authored by you and expressed your views at that time.

Cronson had indicated that he felt that the memoranda is "as much my work as it is yours." We have not had a chance to get a redefinition from Cronson, but one might gather that he felt that his coworker could have been in some trouble on this and he might have been trying to give you a hand. I think that is a reasonable conclusion.

There may have been another explanation, but we are left up in the air on that particular question.

Yesterday, you could read it either way—the I's in it certainly could have been yours rather than Justice Jackson's.

And then, in 1971, we had the response of Elsie Douglas, who had been Justice Jackson's secretary for 9 years, who said that she thought your account was "incredible on its face," and that by attributing the memoranda's prosegregation view to Justice Jackson, you had, and I quote, "smeared the reputation of a great Justice."

I do not know whether you saw that statement that she made in 1971 or whether you have any response to Elsie Douglas. I understand she feels very much the same way even today. I do not know whether you want to make any response to that opinion of Elsie Douglas.

Justice **Rehnquist**. Well, I naturally regret that she feels the way she does. I have given the committee the best explanation, the best reconstruction I can of that memo, some first in 1971 when it was 25 years old, and now in 1986 when it is 34 years old.

Senator **Kennedy**. Well, I would think that this whole issue has not just faded away in the meantime. It was raised during the last confirmation. As has been pointed out, the major bedrock decision on the civil rights of our time and, as you can well imagine, it makes a rather important difference whether the "I's" referred in there were yours, or the "I's" referred in there were the Justice's.

And you have maintained in your response that they were his.

In your 1971 response, and yesterday, you indicated that it could be read either way. I do not know whether there is anything further that you want to add to that.

Consider the language which has been quoted here in that last paragraph:

> I realize that it is an unpopular and unhumanitarian position for which I have been excoriated by liberal colleagues, I think *Plessy* v. *Ferguson* was right, it should be reaffirmed.

In 1957, you wrote an article, "Who Writes Decisions of the Supreme Court." In it you wrote "some of the tenets of the 'liberal' point of view which commanded a sympathy of majority of the clerks I knew were extreme solicitude for the claims of Communist and other criminal defendants; expansion of Federal power at the expense of State power, great sympathy towards any government regulation for business." And the word "liberal," in this article is in quotes as the word "liberal" was in your memoranda on the school segregation cases. And the liberal clerks which you commented on in the article, I would think any reasonable person could believe were the same colleagues that you were referring to in your memoranda.

It is not only my judgment of that. In the definitive work on the *Brown* decision, the Kluger book entitled "Simple Justice," he analyzes the issue of your memoranda exhaustively, and he concludes "Taking the careers and judicial assertions of both men in their totality"—meaning Justice Jackson and yourself—"one finds a preponderance of evidence to suggest that the memoranda in question, the one that threatened to deprive William Rehnquist of his place on the Supreme Court, was an accurate statement of his own views on segregation, not those of Robert Jackson who, by contrast, was a staunch libertarian and humanist."

So that sentence in the memoranda about being excoriated for segregationist views, I find impossible to really give to Justice

Jackson. And I am just wondering whether, in your own views, whether you have had any chance to think that whole matter through, and whether there is anything more that you can say that can help clarify exactly the purpose for that memoranda and who the "I's" refer to? Do the "I's" refer to you, Mr. Rehnquist?

Justice **Rehnquist**. No, I do not think they do.

Senator **Kennedy**. You maintain the "I's" refer then to Justice Jackson?

Justice **Rehnquist**. Yes. Obviously something for him to say.

Senator **Kennedy**. Mr. Chairman, I ask that the Rehnquist memoranda, his 1957 article, Mr. Kluger's analysis of the issue, the book "Simple Justice" be printed in the record.

The **Chairman**. How long is it?

Senator **Kennedy**. It is not long. I imagine his memoranda is two pages, his article is, his 1957 article is what, 1,000 words, 1,200 words?

Justice **Rehnquist**. No more than that.

Senator **Kennedy**. A thousand words.

The **Chairman**. Without objection, so ordered.

[Information follows:]

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Excerpt from Simple Justice, by Richard Kluger

At the age of sixty, his ambitions to be President or Chief Justice now largely behind him, Robert Jackson remained the most intellectually charming member of the Court. The commendable and difficult job he had done as chief counsel for the United States at the International Military Tribunal at Nuremberg had made him a world figure, and his work at the Court had demonstrated his firm command of constitutional law in all its sinuous complexity. Off the bench, he enjoyed life in exurban McLean, Virginia, at his manorial home, Hickory Hill, later owned by John and then Robert Kennedy; he loved to fish and ride and hike and go camping and to take a belt of his favorite brand of bourbon. What he did best of all, though, was write. Probably only Holmes matched or surpassed him as a stylist. It was Jackson who penned the ultimate aphorism on the Court's uniqueness: "We are not final because we are infallible, but we are infallible only because we are final."

A partial clue to Justice Jackson's posture toward the segregation cases may be found in his admirable 1941 book, *The Struggle for Judicial Supremacy*, in which he wrote:

> . . . Legal learning is largely built around the principle known as *stare decisis*. It means that on the same point of law yesterday's decision shall govern today's

> decision. Like a coral reef, the common law thus becomes a structure of fossils. . . . Precedents largely govern the conclusions and surround the reasoning of lawyers and judges. In the field of common law they are a force for stability and predictability, but in constitutional law they are the most powerful influence in forming and supporting reactionary opinions. The judge who can take refuge in a precedent does not need to justify his decision to the reason. He may "reluctantly feel himself bound" by a doctrine, supported by a respected historical name, that he would not be able to justify to contemporary opinion or under modern conditions.

Such a conviction freed Jackson from the sort of constricting doctrinal devotion that made Frankfurter seem a far more consistent jurist. It also seemed to free Jackson from the obligation to follow his own prior judicial positions. In a 1950 opinion, he could thus bluntly warn Congress to leave men's minds alone in its zeal to check the domestic spread of Communism by repressive laws, yet the very next year he voted with the Court majority upholding the Smith Act that punished Communist leaders not for any overt acts they took toward overthrowing the government but because of their conspiratorial speech and teachings. In one case, he would scorn Harlan Stone's doctrine that the First Amendment, or any part of the Constitution, could occupy a "preferred position" among the rights and protections granted by the great document; in other cases, he himself seemed to espouse a preferred position for the Fourth Amendment, outlawing unreasonable searches and seizures. He was proud of his dissent in *Korematsu*, one of the Japanese-American relocation cases during the Second World War, but he was on the majority side in the companion (and not readily distinguishable) *Hirabayashi* case. He was, in short, often as inconsistent and unpredictable as he was brilliant.

As Jackson reviewed the legal arguments in *Brown*, he saw no basis in the prior uses of the law for overruling segregation. By his own lights, though, this hardly shut the door on such a ruling. Nor did he doubt, according to a memo he wrote fifteen months later, that the continued practice of segregation was not wise or fair public policy. Yet he shared Frankfurter's belief that the Court's decision could hardly take the form of a simplistic rendering of his own—or the rest of the Justices'—personal convictions in the matter. He saw little help in the extra-legal sociology and psychology that the black lawyers had introduced into the case; all that struck Jackson as rather too subjective and unmeasurable. And he was worried about how a Court decision outlawing segregation would affect the nation's respect for "a supposedly stable organic law" if the Justices were now, overnight as it were, to alter an interpretation of the Fourteenth Amendment that had stood for more than three-quarters of a century. Even if he could have put that concern aside, he had doubts that a seemingly "ruthless use of federal judicial power" would have much effect in truly abolishing Jim Crow practices.

The Justice asked his two 1952 Term clerks for an advisory memorandum on the segregation cases. The two clerks later seemed to disagree on whether their memos were intended to be a playback of Jackson's own views or a statement of the varying positions Jackson might adopt in the case, and internal evidence suggests that they may have been neither but were instead invited statements of each clerk's personal views of the case. One memo, initialed "DC" on the bottom for clerk Donald Cronson, a Chicago Law School graduate, was titled "A Few Expressed Prejudices on the Segregation Cases," and stated that, according to its author's prejudices, "there is no doubt that Plessy was wrong" and should have been decided along the lines of Harlan's dissent. But to say that *Plessy* was wrongly decided did not dispose of the matter, the Cronson memo went on, because the decision had resulted in the growth of important institutions—"not only rules of law, but ways of life"—and under those circumstances, Cronson said, he questioned "the wisdom or propriety of overruling the case, right or wrong." He acknowledged that there was perhaps not much justification for keeping an incorrect ruling on the books, but "where a whole way of life has grown up around such a prior error, then I say that we are stuck with it—until such time as Congress sees fit to act. . . ." The Court, Cronson thought, should confess error in *Plessy*—just how, he did not say—and "straighten out the mess so that Congress may by legislation prohibit segregation." If Congress chose not to do so, even after being advised by the Court that segregation was unconstitutional, then surely the Court should not do so by a sweeping decree, Cronson concluded.

The second memo was less ambiguous. It was titled "A Random Thought on the Segregation Cases" and is of historical interest because of the initials at the bottom—"whr"—which stand for William H. Rehnquist, who nineteen years later became the one hundredth man to sit on the Supreme Court. His memo threatened for a time to cost him that seat. The memo, Rehnquist advised the Senate while it was weighing his nomination to the high court in 1971, had been written at Justice Jackson's request and represented Jackson's views on the segregation cases. The Justice wanted the memo, Rehnquist said, to arm himself when speaking at the conference of the Justices. The informal nature of the memo, Rehnquist reflected, made him think that it had been "prepared very shortly after one of our oral discussions on the subject." The first half of the two-page Rehnquist memo is a gratuitous thumbnail sketch of the Court's earlier tendency to read its own economic views into the Constitution. The second half of the memo bemoaned the possibility of the Court's reading its own social views into the Constitution by now voting to outlaw segregation. Rehnquist wrote in part, allegedly paraphrasing the position Jackson was about to state to his fellow Justices:

> . . . Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would submit that this is a question the Court need never reach. . . . If this Court, because its members individually are "liberals" and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects.

To those who argue that personal rights are more sacrosanct than property rights, the memo added. "the short answer is that the Constitution makes no such distinction." Then it continued:

> . . . One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.
>
> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy* v. *Ferguson* was right and should be re-affirmed. . . .

If Rehnquist was telling the truth to the Senate in 1971* and the words in

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* There is much evidence, both internal and external, that casts doubt on Rehnquist's account of the nature of his memorandum. After it was published in *Newsweek* at the time of the Senate confirmation hearings, some liberal Senators and civil-rights proponents took the memo at face value—that is, as a statement of Rehnquist's own views, since it bore his initials and an informal, rather personal-sounding title, "A Random Thought on the Segregation Cases"—and challenged his suitability to be appointed to the Court in view of his having apparently favored the upholding of segregation. Faced with growing resistance to his nomination, Rehnquist sent a letter on December 8, 1971, to Senate Judiciary Committee Chairman James Eastland which said that to his best recollection after some nineteen years, "the memorandum was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of his views at the conference of the Justices, rather than as a statement of my views." Rehnquist went on to say that Jackson had asked him to assist "in developing arguments which he might use in conference when cases were discussed. He expressed concern that the conference should have the benefit of all of the arguments in support of the constitutionality of the 'separate but equal' doctrine, as well as those against its constitutionality." The clear implication was that Rehnquist's memo was intended to add armor to Jackson's defense of *Plessy.* Rehnquist wound up his explanation to the Senate by stressing that the memo was very unlike most of those normally done by the clerks of the Court in analyzing cases, that the style of the memo was hardly that of a clerk addressing the Justice he worked for but was prepared by Rehnquist "as a statement of Justice Jackson's tentative views for his own use at conference," and that Rehnquist himself fully supported (in 1971) "the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision."

Of the two living people who might have corroborated Rehnquist's explanation to the Senate, one offered elaborations that seemed to conflict with the Rehnquist account, and the other sharply denied it.

Rehnquist's fellow clerk, Donald Cronson, by then an executive with Mobil Oil in the company's London office, cabled a message to Rehnquist that Republican Senate Minority Leader Hugh Scott placed in the *Congressional Record* for December 9, 1971. Cronson wrote, "It is my recollection that the memorandum in question is my work at least as much as it is yours and that it was prepared in response to a request from Justice Jackson. . . ." That was the first piece of information supplied by Cronson which did not quite mesh with Rehnquist's explanation: Rehnquist had not suggested that the memo was a collaborative effort. Cronson went on to say that prior to the memo which bore Rehnquist's initials at the end, "another memorandum was prepared of which I still have a copy. It is my recollection that I actually typed the first memorandum, although it is possible that you did. It was in any case the result of collaboration between us." Cronson then described the first memo, which he said contended that *Plessy* had been wrongly decided but that the Court should leave it to Congress to implement any change in the practice of segregation—that is, the memo titled "A Few Expressed Prejudices on the Segregation Cases" and carrying Cronson's initials at the end, which survives in Justice Jackson's papers. Later, Cronson said, Jackson asked for a second memo "supporting the proposition that *Plessy* was correctly decided. The memorandum supporting *Plessy* was typed by you, but a great deal of the content was the result of my suggestions . . . and it is probable that the memorandum is more mine than yours."

Cronson's explanation raises at least three questions: (1) Why did Rehnquist fail to his undated memo even remotely reflected Jackson's views, then the Justice must have undergone a considerable change of heart about presenting them to his colleagues at the Court conference on December 13, 1952, for little in Burton's notes on Jackson's remarks resembles any of the thoughts attributed to him in the Rehnquist memo. And nothing in the memo that Jackson himself prepared on the subject in February 1954 remotely suggests that he ever thought that *Plessy* had been rightly decided.

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mention the first memo in his letter to the Senate? (2) If Jackson had requested two memos reaching opposite conclusions on the rightness of *Plessy*, why did Rehnquist claim that the second memo—the one bearing Rehnquist's initials—represented Jackson's view of the case? Cronson did not suggest that Jackson had changed his mind after the first memo, only that he wanted a second memo reaching the opposite conclusion. (3) If Rehnquist and Cronson had collaborated on both memos to the extent that Cronson suggests (and Rehnquist never suggested), why did each memo carry the initials of just one of the clerks, why were the styles of the memos so different, and why would Rehnquist not want to inform the Senate that another man was co-author of the memo that was the subject of such controversy—especially if, as Cronson put it, the memo was "more mine than yours"?

The other person who might have corroborated Rehnquist's explanation of the memo was Mrs. Elsie Douglas, Jackson's secretary and confidante for the nine years preceding his death in October 1954. She told the Washington *Post* that by attributing the views of a pro-segregation memo to Jackson, Rehnquist had "smeared the reputation of a great Justice." She challenged Rehnquist's assertion that Jackson would have asked a law clerk to help prepare the remarks he would deliver at a conference of the Justices, especially in view of Jackson's acknowledged gift for spontaneous eloquence and his splendid oral performances before the Court while Solicitor General and while serving at the Nuremberg war-crimes trials. She told *Newsweek* that Rehnquist's account was "incredible on its face."

Without resort to the statements by Cronson or Mrs. Douglas, Rehnquist's attribution to Jackson of the views in the 1952 Term memo bearing Rehnquist's initials is challenged by internal evidence in both the Rehnquist and Cronson memos:

(1) The titles of both memos are strikingly inappropriate to the use Rehnquist claims Jackson had in mind: as a draft of the Justice's views for presentation to his fellow Justices. Is it possible that Cronson would have titled his memo "A Few Expressed Prejudices on the Segregation Cases" or Rehnquist would have called his "A Random Thought on the Segregation Cases" if either or both had been drafted for use by the Justice at conference? The Justices, one would think, would hardly be inclined to conceive of their considered views as either "prejudices" or "a random thought." But such titles would be entirely appropriate if Justice Jackson had simply asked each of his clerks to put down informally his own personal views on the case for the Justice's consideration.

(2) Is it possible that Jackson would have bothered to deliver so crude and elementary a summary of the Court's historic position on property rights and its preferential treatment of business interests—the subject of the first half of the Rehnquist memo? Every member of the Vinson Court except Burton was a veteran New Dealer, entirely familiar with the court-packing fight and the Court's pre-1937 biases.

(3) Is it possible that Jackson would have disaparaged, as Rehnquist indicates in the memo that the Justice planned to, "150 years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses" when Jackson himself wrote many a decision protecting minority rights? Among the most eloquent was Jackson's opinion in the second flag-salute case, *West Virginia Board of Education v. Barnette* in 1943, which took the side of the Jehovah's Witnesses and concluded with one of the Justice's most memorable passages: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . ."

(4) Is it possible that so confident and civilized a man as Robert Jackson would have told his brother Justices anything remotely approaching what Rehnquist writes at the end of his memo purportedly reflecting Jackson's views—namely, "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy* . . . was right and should be affirmed"? The "I" in that passage, according to Rehnquist, was supposed to be Jackson, not his clerk, but when and where might Jackson have been excoriated by his "liberal" colleagues? And what colleagues might those be? Surely not his

According to Burton's notes, Jackson began his comments to the Justices with the aside that if they were going to take their time to thrash the cases out, it would be better for them not to take a vote that day. Burton's diary entry for that date indicates that the suggestion was adopted: "We discussed the segregation cases thus disclosing the trend but no even tentative vote was taken." Burton's notes on Jackson's presentation are hard to decipher, but they seem to say that Jackson had found nothing in his reading of legislative

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fellow Justices, who would hardly have spoken ill of him for expressing genuine convictions. A far more plausible explanation might be that the "I" of the memo is Rehnquist himself, referring to the obloquy to which he may have been subjected by his fellow clerks, who discussed the segregation question over lunch quite regularly, who were almost unanimous in their belief that *Plessy* ought to be reversed, and who were, for the most part, "liberal." Support for this surmise is lent by an article that Rehnquist wrote in the December 13, 1957, issue of *U.S. News & World Report.* Under the title "Who Writes Decisions of the Supreme Court?" it says, as part of a complaint against the leftward bias of the clerks: "Some of the tenets of the 'liberal' point of view which commanded the sympathy of a majority of the clerks I knew were: extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business. . . ." The telltale use of quotation marks around the word "liberal" adds to the suspicion that the "I" of the Rehnquist memo was never meant to be Robert Jackson speaking to his brethren. That Rehnquist was ideologically a pole apart from his fellow clerks that year is suggested by the comment of Harvard law professor Donald Trautman, who clerked for Justice Frankfurter that term. "As I knew him, he was a reactionary," Trautman told the *Harvard Law Record* of October 24, 1971, at the time of Rehnquist's Court appointment. "I would expect him to be a reactionary today, but you never know what a person will do once he's appointed."

(5) While Rehnquist claimed his memo was intended to convey Jackson's words and thoughts, it would be difficult to support such a claim for the companion Cronson memo, which is plainly a memo from a clerk to his Justice, as evidenced by the paragraph that begins, "One of the main characteristics to be found in *your* work on this Court is a reluctance to overrule existing constitutional law . . . [emphasis added]."

(6) In his disclaimer to the Senate, Rehnquist did not say that he agreed with the *Brown* decision when it was made, only that he agreed with it in 1971, when he was being scrutinized for appointment to the Supreme Court—and when "an unpopular and unhumanitarian position" in favor of segregation might well have cost him his seat on that Court. That Rehnquist may once have felt otherwise about the outcome in *Brown* can be inferred from a passage in an article by Rehnquist in the *Harvard Law Record* of October 8, 1959, a dozen years before his appointment:

> . . . There are those who bemoan the absence of *stare decisis* in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the constitution which have been most productive of judicial law-making—the "due process of law" and "equal protection of the laws" clauses—are about the vaguest and most general of any in the instrument. The Court in *Brown v. Board of Education* . . . held in effect that the framers of the Fourteenth Amendment left it to the Court to decide what "due process" and "equal protection" meant. Whether or not the framers thought this, it is sufficient for this discussion that the present Court [the one that decided *Brown*] thinks the framers thought it.

It remains to be said that William Hubbs Rehnquist has been, from the first dawning of his political awareness, a forceful, outspoken conservative with a low threshold of tolerance for civil-liberties claimants and the civil rights of minorities. "The Justice's views on the law, the Constitution, discrimination and crime seem indistinguishable today from those [that] friends recall in his late adolescence," wrote veteran Washington correspondent Warren Weaver, Jr., in an article on Rehnquist in the October 13, 1974, issue of the *New York Times Magazine.* "While most people's views evolve and shift as they grow older, Rehnquist's conservative outlook seems to have been adopted and then flash-frozen while he was an undergraduate at Stanford. . . . A law-school classmate at Stanford, an unabashed liberal, recalls: 'Rehnquist was very consistently more than just conservative. . . .' Another fellow student observed: 'Bill was the school conservative. A lot of us had mixed views about him. He was very sharp, a brilliant student, but or judicial history that suggested segregation had been thought unconstitutional anywhere along the line. He thought Thurgood Marshall's brief contained more sociology than law, and he had his doubts that racism could be overcome in America "by putting children together." Still, he thought the Court might be able to justify the abolition of segregation on political grounds, though he did not see how the Justices could claim a judicial basis for the decision. He would likely go along with such a politically framed decision provided it gave the segregating states "reasonable time" to adjust to the ruling. But if the Court were to rule that the South had been acting illicitly all along, he would have trouble going along.

Jackson's 1953 Term clerk E. Barrett Prettyman, Jr., elaborates: "Justice Jackson was wary. He wanted to make sure that the Court was going to shoot straight. He didn't want it to accuse the South of behaving unconstitutionally all those years, especially since the history of the Fourteenth Amendment didn't really point to the conclusion that *Plessy* should be reversed. In short, he wanted the Court, in ending segregation, to admit that it was making new law for a new day."

Had it been practicable, Jackson's preference might have been to follow the essence of the Cronson memo and urge the Court to shape an advisory opinion holding: (1) the *Plessy* doctrine had been attenuated and neutralized by a whole line of cases, most recently *Sweatt* and *McLaurin* (but others as well in the areas of transportation, restrictive housing covenants, and voting rights); (2) if the Court in *Plessy* had meant to deny Congress's power to outlaw segregation under Section 5 of the Fourteenth Amendment, then the Court had erred; but (3) in the absence of congressional initiative in the

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so far-out politically that he was something of a joke.'" In private law practice in Phoenix, he gave a speech in 1957 denouncing Justices Black and Douglas, among others, as "left-wing" and called them down for "making the Constitution say what they wanted it to say." He was an ardent supporter of fellow Arizonan Barry Goldwater's political fortunes, and as a Phoenix civic leader Rehnquist spoke out forcefully against a local anti-discrimination ordinance and asserted in opposition to a 1967 desegregation program in the city's schools that "we are no more dedicated to an 'integrated' society than we are to a 'segregated' society." As an Assistant Attorney General and head of the Office of Legal Counsel in the Nixon administration, he was well known as the Justice Department's most ardently prosecutorial advocate of wiretapping, government surveillance, preventive detention, and other so-called law-and-order techniques of a totalitarian cast. In 1970, he drafted for the White House a proposed constitutional amendment prohibiting bussing to achieve desegregation. In the Supreme Court, he has consistently voted to constrict civil rights and civil liberties, opposing the claims of, among others, women seeking abortions, poor people who had to wait a year before qualifying for public medical services, aliens applying for civil-service jobs and lawyer's licenses, and Negroes seeking expanded school-desegregation efforts in Denver, Richmond, and Detroit. He has voted to retain the death penalty, to permit warrantless searches for narcotics of people stopped for minor traffic offenses, and to authorize government agents to lure a defendant into a crime if he was deemed to have a "predisposition" to commit it anyway. In antitrust cases, he usually sided with business against government; in labor cases, he usually sided with management against unions. In September 1974, he gave a speech characterizing himself as a "libertarian" in the sense of one who conceives minimum-wage and maximum-hour legislation as interfering impermissibly with an employer's freedom of choice.

Taking the careers and judicial assertions of both men in their totality, one finds a preponderance of evidence to suggest that the memorandum in question—the one that threatened to deprive William Rehnquist of his place on the Supreme Court—was an accurate statement of his own views on segregation, not those of Robert Jackson, who, by contrast, was a staunch libertarian and humanist. The Senate confirmed Rehnquist's nomination, 68 to 26.

matter, the Supreme Court ought not to intrude, for it lacked the administrative machinery and specialized local knowledge to oversee the desegregation process, not to mention the will to do so. Jackson felt strongly that Congress had shunned its responsibility and he had implied as much in one of his questions during the oral argument. The idea of an advisory opinion was thus appealing to Jackson but not to Frankfurter, who mentioned it skeptically to Elman. The worst thing the Court could do, in Frankfurter's view, was to get up on its hind legs and then get right down again; better not to have heard the cases at all than to issue an opinion implying a moral imperative to cure a social evil but confessing the Court's incapacity or indisposition to attend to the matter until Congress had done so first.

Jackson, then, was keeping his options open. His reluctance to see any real judicial basis for overturning segregation—and his flirtation with the sort of advisory opinion that the Court had insisted since John Marshall's day it could not constitutionally issue to the other branches of government—were almost certainly why Frankfurter, in his May 20, 1954, letter to Reed, listed Jackson as a probable vote to affirm segregation as of the 1952 Term. That was one good reason why Frankfurter badly wanted to hold off a vote.

Memorandum From President Ronald Reagan for the Heads of Executive Departments and Agencies, on Procedures Governing Responses to Congressional Requests for Information, November 4, 1982

THE WHITE HOUS

WASHINGTON

November 4, 1982

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS
AND AGENCIES

SUBJECT: Procedures Governing Responses to Congressional Requests for Information

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches. To ensure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific Presidential authorization.

The Supreme Court has held that the Executive Branch may occasionally find it necessary and proper to preserve the confidentiality of national security secrets, deliberative communications that form a part of the decision-making process, or other information important to the discharge of the Executive Branch's constitutional responsibilities. Legitimate and appropriate claims of privilege should not thoughtlessly be waived. However, to ensure that this Administration acts responsibly and consistently in the exercise of its duties, with due regard for the responsibilities and prerogatives of Congress, the following procedures shall be followed whenever Congressional requests for information raise concerns regarding the confidentiality of the information sought:

1. Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege. A "substantial question of executive privilege" exists if disclosure of the information requested might significantly impair the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or

other aspects of the performance of the Executive Branch's constitutional duties.

2. If the head of an executive department or agency ("Department Head") believes, after consultation with department counsel, that compliance with a Congressional request for information raises a substantial question of executive privilege, he shall promptly notify and consult with the Attorney General through the Assistant Attorney General for the Office of Legal Counsel, and shall also promptly notify and consult with the Counsel to the President. If the information requested of a department or agency derives in whole or in part from information received from another department or agency, the latter entity shall also be consulted as to whether disclosure of the information raises a substantial question of executive privilege.

3. Every effort shall be made to comply with the Congressional request in a manner consistent with the legitimate needs of the Executive Branch. The Department Head, the Attorney General and the Counsel to the President may, in the exercise of their discretion in the circumstances, determine that executive privilege shall not be invoked and release the requested information.

4. If the Department Head, the Attorney General or the Counsel to the President believes, after consultation, that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President, who will advise the Department Head and the Attorney General of the President's decision.

5. Pending a final Presidential decision on the matter, the Department Head shall request the Congressional body to hold its request for the information in abeyance. The Department Head shall expressly indicate that the purpose of this request is to protect the privilege pending a Presidential decision, and that the request itself does not constitute a claim of privilege.

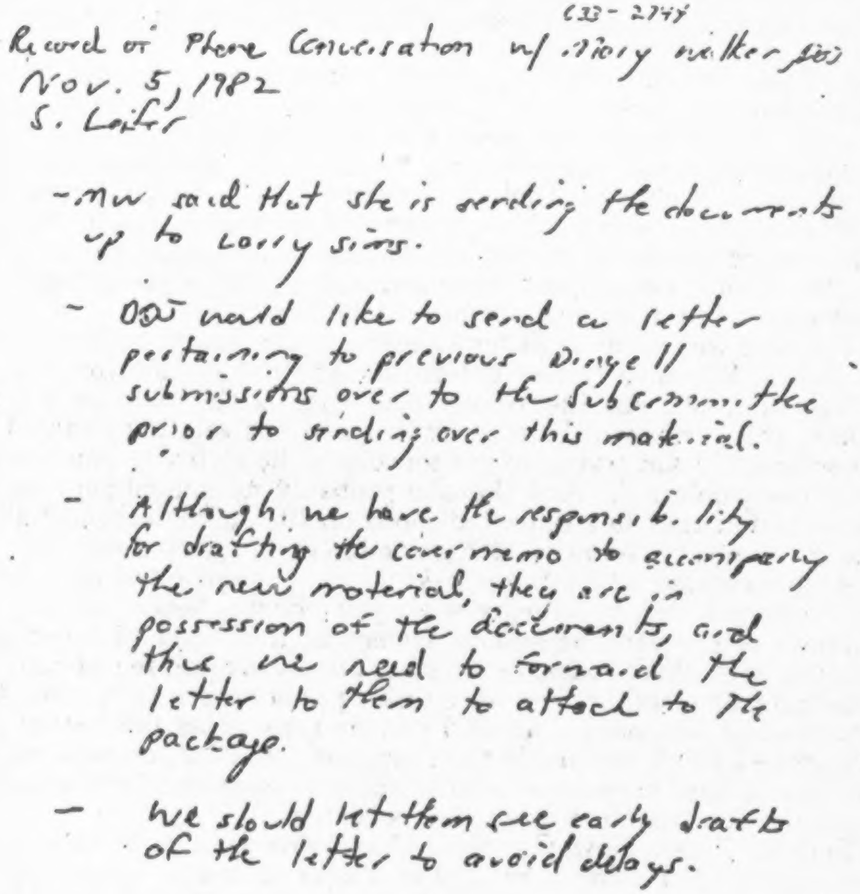
6. If the President decides to invoke executive privilege, the Department Head shall advise the

requesting Congressional body that the claim of executive privilege is being made with the specific approval of the President.

Any questions concerning these procedures or related matters should be addressed to the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, and to the Counsel to the President.

Ronald Reagan

HANDWRITTEN RECORD OF TELEPHONE CONVERSATION WITH MARY WALKER, PREPARED BY STEVE LEIFER, NOVEMBER 5, 1982



633-2744

Record of Phone Conversation w/ Mary Walker DOJ
Nov. 5, 1982
S. Leifer

- MW said that she is sending the documents up to Larry Sims.

- DOJ would like to send a letter pertaining to previous Dingell submissions over to the Subcommittee prior to sending over this material.

- Although we have the responsibility for drafting the cover memo to accompany the new material, they are in possession of the documents, and thus we need to forward the letter to them to attach to the package.

- We should let them see early drafts of the letter to avoid delays.

Senator **Kennedy**. I have no further questions.

If there is any problem, I will be glad to read them into the record, Mr. Chairman.

I have no further questions.

The **Chairman**. The distinguished Senator from Delaware.

Senator **Biden**. Thank you, Mr. Chairman.

Mr. Justice, I would like to go back, if I can, to the 14th amendment and not talk about necessarily specific cases at first, but try for me to understand your reasoning.

As I said, it is a little like a serial, is it not? When we last left off at the ranch, you had been quoted as saying—first of all, I think Senator Hatch made a comment in his opening statement about coming storms. He was referring to—Senator Hatch was referring to the societal changes that had taken place, and the storms that the Court had found itself in, and there would be coming storms, and that obviously we do not know what those storms are going to be. We do not know what those seminal decisions are going to be that you as Chief are going to have to be part of.

The best we can do is to try to learn in the words quoted by you of Cicero. We have to see, determine whether or not you see life clearly and can see life whole. And that is the purpose for my asking this, what will be a series of questions relating to the 14th amendment. I am trying to get an idea of how clearly you see life and how whole it is. And there is probably no amendment in the Constitution that has impacted more on life in the second half of the 20th century than the 14th amendment in my opinion.

As I indicated when I was asking you several questions, I was trying to get into a colloquy with you about whether or not the framers of the 14th amendment were in fact—had in mind only dealing with black codes, or whether they were talking about race generally, or whether they were talking about more than that. And you made a comment that—if I can find my notes here—that you thought—I think you made the following comment, correct me if I am wrong, that they were talking about persons similarly situated.

Justice **Rehnquist**. I think that is correct.

Senator **Biden**. Now, who were those persons, in your view, similarly situated? I mean it related to blacks obviously, black codes is related to—and those persons similarly situated with the blacks were people who would have been in slavery at one point, and not too much earlier than that.

Who else might they have been talking about?

Justice **Rehnquist**. Perhaps I can amplify a little bit.

If their intent were to prevent the newly-freed blacks from being subject to black code, they could have drafted a fairly specific provision, saying that this kind of thing is prohibited. They did not. They used quite general language, saying no person shall be deprived of life, liberty or property without beep, beep, or no State shall deprive any person of the equal protection of the laws.

And so I think you have a situation at which they were aiming, which was the specific one, and yet they used general language to cover—and the fact they used general language makes one think that they certainly wanted to cover the evil at which they were aiming, but also other evils that might be similar to it.

Senator **Biden**. So when they say in the 14th amendment, section 1, all persons, that is—that comports with what you just said. They were obviously aiming beyond just the black code in your view?

Justice **Rehnquist**. I think so.

Senator **Biden**. That would be my view too.

Now, let me ask you then, in your dissent in *Craig* v. *Boren*, you asked, and I quote, "Why the statute here should be treated any differently here from countless legislative classifications unrelated to sex which have been upheld."

You then go on to cite cases of discrimination where the Court has upheld such classifications, such as laws and limits of power to treat eye problems by optometrists only. And I realize from the statute here in *Craig*, and we were just talking about the 14th amendment, which is a constitutional principle or constitutional amendment.

But is there not a difference between the discrimination on the basis of not being the man than discrimination on the basis of not being an optometrist or not—do you understand what I am driving at?

Justice **Rehnquist**. Yes. I think it is actually—I think the person claiming the right in Craig against Boren was not a woman but a man. It was I think Oklahoma. I think it was perhaps when Senator Boren was the Governor, had passed a statute saying that women could, I think, buy liquor or buy beer at age 18, but men could not until they were 21. And there was a man who was 19 or 20 who said that is a denial of the equal protection of the laws, to treat men differently from women.

And I think the position I took there was that, just like a legislature is going to have to distinguish between, you know, optometrists, opticians, any number of other similarly situated people in regulating that sort of a thing, a legislature ought to be able to make reasonable judgments about whether, perhaps because the men do the driving or did the driving or something like that at the time the statute was passed, there was a reason for putting down different age limits and restricting men more than women.

Senator **Biden**. If the law had been that whites could drink at age 18 but blacks not till 21, and they could be shown statistically, if it could, be shown statistically that blacks had many more accidents relating to drinking, would that have been a reasonable test that could have meant—would that have been constitutional?

Justice **Rehnquist**. Well, our cases are—there is disagreement among the members of the present Court on some of the standards to be applied in equal protection. I think we all agree that any classification based on race is suspect, and that only what is called a compelling State interest would justify it.

And I think even if there were——

Senator **Biden**. On what grounds? How do you arrive that it is only compelling State grounds? What do you look to to come to that conclusion?

Justice **Rehnquist**. Well, that is kind of embarrassing because the phrase was used in an opinion, I think, about 25 or 30 years ago, and it has been picked up in subsequent opinions. It is not out of the Constitution, but it is kind of a shorthand form, as I understand it, of saying the kind of justification you would have to advance, or a law that treats blacks in any way differently from whites or Asians or, you know, any sort of racial discrimination.

And the Court has never gone so far as to say there are no circumstances in which that can happen, and I think the recent minority hiring cases, of course, talk about compelling circumstances that justify in some circumstances giving preferential hiring.

Senator BIDEN. Is that the same standard that is used for women?

Justice REHNQUIST. No. I think the prevailing standard now for women is what is called intermediate scrutiny.

Senator BIDEN. Why the different standard?

In other words, it seems to me—if I can take you back, Mr. Justice—it seems to me it goes back to your interpretation of, as I read your statements and your speeches and your cases, all of which I have read on this area—and I have literally read more cases in preparation for this hearing than I did in 3 years of law school, and I went to law school on a full academic scholarship. I was the only one of three in my entire class. And I have literally read more of your cases. I think I have read about everything you have written.

And as best I see it, you make the following argument: that is, that the 14th amendment—in section 1 of the 14th amendment, relating to due process and equal protection, that as you apply the due process clause of the section 1 of the 14th amendment, and the equal protection clause of section 1 of the 14th amendment to blacks, it is one standard. But as you apply it to women, there is a different burden of proof that is required.

And my question is, what is your rationale for requiring one type of discrimination to meet a higher burden than another type of discrimination?

Justice REHNQUIST. Senator, it is not simply my rationale. But I think our——

Senator BIDEN. I am only concerned about yours, nobody else's.

Justice REHNQUIST. Well, I am trying to think if I have covered that in anything I have written.

Senator BIDEN. You have.

Justice REHNQUIST. Well, what case?

Senator BIDEN. Well, what you have covered—the way as I understand you explain it, and obviously you know what you have written much better than I, but I tried real hard, you make the argument that the framers of the 14th amendment did not envision covering women; that women were not in fact persons similarly situated at the time the 14th amendment was written. And I believe you have even gone on to state a right somewhere that because section 2 of the 14th amendment makes reference to suffrage, that you stated that obviously they could not have been referring to women in Section 1, ergo although when they say "all persons" in section 1 of the 14th amendment, they obviously mean all blacks; that all persons does not refer to women. That is the argument that I glean from your writings that you make.

Justice REHNQUIST. No. That is——

The CHAIRMAN. Senator, your time is up. But you can answer this question.

Justice REHNQUIST. That is a mistake, Senator. And if you will come back to that, I can give it——

Senator BIDEN. Will you give me time——

Justice REHNQUIST. May I expand on my answer?

Senator BIDEN. Yes. I am seriously interested in knowing what——

Justice REHNQUIST. The 14th amendment, the equal protection clause, by its term, applies to all persons. That is any person under the sun.

So the question is what standards do you use in judging the claim of a person under that amendment? And the strict scrutiny standard or the compelling State interest standard that we talked about earlier, is the one that you use for judging claims advanced by blacks and similarly situated people.

Senator BIDEN. Who are they?

Justice REHNQUIST. I think we have—I know the Court has applied it to Chinese, Chinese-Americans in the *Yic Wo* case.

Then the question becomes, when a woman is advancing that claim on the basis of a law which distinguishes between men and women, does the woman or the man, for that matter, get the benefit of that sort of a standard, that very strict standard? And I think the response, and this has been mine, but also the other members of the Court, we do not agree entirely but we will both respond this way, no, discrimination between men and women is not to be treated the same as be it discrimination between blacks and whites. Women and men are virtually equal in our population. And much of the traditional discrimination against women by virtue of labor laws and so forth, while very unfair to them, nonetheless, does not have the—there are many situations in which distinctions between men and women are not genuinely invidious in the way that—it is not felt that it was the same to say, for example, that we do not hire blacks for heavy labor, which is a violently offensive thing, or to say we do not hire women for heavy labor. One may be as wrong as the other, but there is not the same invidious context.

Senator BIDEN. Well, where do you all get this invidious context—I mean where do you read into—unless you—if you adopt, as you do, the original intent—if my colleague would allow me just to finish this. I do not think Senator Hatch would mind because it is really the most—if you go back to reading the intent of the framers as one of the elements that you take into consideration, I do not understand how you could read into the 14th amendment that it was intended to cover blacks and Chinese or Cubans or Lithuanians or whatever, because that was never discussed. I have gone back through the records as best I could, and I do not recall any debate at the time the 14th amendment was passed that spoke of any class of persons other than blacks. Now, maybe there was. I do not recall. I have not found it.

And so if you can expand the categorization from blacks to other races, or blacks to other areas, persons similarly situated, I do not understand why you cannot expand it to women, other than by reaching a conclusion that you do not think it should apply to women. But I do not know how you can base it in an interpretation of the intention of the framers of the 14th amendment, which is something you always go back to in your writings. Whether it is the 14th amendment or the original document, you always go back to the intention of the framers.

Now, you have obviously expanded the intention of the framers based on the legislative discussion that went on in the Senate and the House at the time from blacks to other groups, but you have not expanded it to women. And the only conclusion I reach, and I am not saying you are wrong, I just want to make sure I understand it, the only conclusion I reach is you all think it should not be applied to women, not that you can say that you do not say that the framers intended it not to apply to women.

Justice **Rehnquist**. Senator, is your question directed to the standard of review under the equal protection clause?

Senator **Biden**. It is directed to how you can come up with a different standard for review for women than you do blacks under the equal protection clause of the 14th amendment.

Justice **Rehnquist**. The explanation I just gave you a moment ago is the best one I can think of.

Senator **Biden**. But it is not—well, I do not understand it. Was it because the framers envisioned it that way, or is it because of stare decisis cases have——

Justice **Rehnquist**. No. I do not think anyone for a moment would contend that the people who drafted the 14th amendment in the Congress in 1868 intended to have a very wide ranging prohibition in that clause as to discrimination between men and women.

Senator **Biden**. Why not? It says all persons.

Justice **Rehnquist**. Senator, with all respect, I think you confuse the people to whom the amendment applies, which is everyone, every single person is covered by the language person in the equal protection clause.

Senator **Biden**. Right.

Justice **Rehnquist**. The question is when a person makes a claim, saying I am a person, and further describes themselves as black, female, Oriental, whatever, what standard do we use to decide whether their claim states a violation of the equal protection clause?

Senator **Biden**. Well, the framers never made a distinction on standard. I do not recall anything where the framers ever mentioned any standard by which you would make that judgment other than relating to specific races.

Justice **Rehnquist**. Well, the clause is no State shall deprive any person of equal protection of the laws. That is all there is to it, 10 words.

Senator **Biden**. Right.

Justice **Rehnquist**. There is obviously no standard there and no varying standard. Yet, the Court has come up with varying standards and has adhered to them.

Senator **Biden**. Oh, I know they came up with them.

The only point I am trying to make is for those who suggest that you in fact, and your fellow Justices are strict constructionists and do not read other things into the Constitution, I want to make the point that you do. You have read in different standards. Because on the face of the document it is clear it says all persons.

Now, it seems to me one has to make—and I know you are not alone in this judgment, but it seems to me, and it is presumptuous of me as a lawyer who has not practiced law in 14 years, because I have been in the Senate for 14 years, to get into such a heavy debate with one of the eminent Justices of the Supreme Court. But it seems to me what you and your fellow eminent Justices have done is you have read into, under the cover of saying you are strict constructionists, you have read into the 14th amendment something that is not found in the debates relating to the 14th amendment, something that is not found on the face of the 14th amendment, which is all right. A lot of Justices have done that. I take no exception with that as my strict constructionist friends do.

But the fact that what I do take exception with is my inability to understand your logic and rationale which you keep in other of your writing unrelated to this issue of gender. You always talk about in terms of what my colleagues from South Carolina and Utah would refer to as a strict constructionist interpretation. If you are a strict constructionist, it seems to me you get nowhere but to say that the 14th amendment either applies to all persons, and you cannot make distinguishing standards, or you say it was only intended to apply to blacks ergo it only applies to blacks.

But once you get into this morass is like being half pregnant. No pun intended. You get into this thing when you talk about women, and you make a distinction on a different standard that is beyond me.

I just want to make the point, then I will go back, and I will waive the next round since you have given me double the time. I want to pursue it more because it seems to me that, in fact, it is not what I would call a strict constructionist view of the 14th amendment, but I will get back to that.

I thank you, and if you want to respond, it is up to the chairman.

The **Chairman**. Well, you have pursued it a good while now.

Senator **Biden**. Oh, I will. I hope my colleagues do not think I am being frivolous in this. I think it is a very important constitutional point, and I am kind of proud——

The **Chairman**. Do you want to answer that now?

Justice **Rehnquist**. I was not sure it was a question. [Laughter.]

The **Chairman**. I am not either. [Laughter.]

Senator **Heflin**. I thought it was a Law Review article. [Laughter.]

Senator **Biden**. Thank you, Judge. Thank you. I am flattered. We are laughing but there is a lot of women wondering.

The **Chairman**. Joe, you are young and bright. We are going to send you back to law school.

Senator **Biden**. I am ready. I am ready.

The **Chairman**. The distinguished Senator from Maryland.

Senator **Mathias**. Thank you, Mr. Chairman. I just have a brief question that I would like to propound.

Justice Rehnquist, you have indicated that, in your opinion, one of the main problems facing the Supreme Court is a lack of decisional capacity. You pointed out that the number of cases that the Court now decides is not dramatically greater than it was deciding 40 years ago. But—and I think I quote you correctly—you say this is simply not a large enough number of cases to enable us to address the numerous important statutory and constitutional questions that are being decided by the courts of appeals and the 50 high courts of the States.

I think you wrote that in an article published in the Florida State University Law Review.

Justice **Rehnquist**. Yes, I did, Senator.

Senator **Mathias**. What then do you think are the cases that are not being decided now that could be and should be decided if the Supreme Court's decisional capacity were increased?

Justice **Rehnquist**. There are a number of cases where a Federal statute is construed one way by one court of appeals and another way by another. My colleague, Justice White, is the most determined advocate of this view, that there ought not to be those sort of different readings on any important question of law.

In effect, the Internal Revenue Code ought to not to mean one thing in South Carolina and another thing in South Dakota. I think it is very hard to argue that position when you're dealing with a statute that's been enacted by Congress, presumably because Congress wanted a uniform interpretation. There are a number of those cases every year that we do not review because there seemed to a sufficient number of Justices to be more pressing issues that need to be reviewed.

But I think all of us would agree that if there were adequate national decisionmaking capacity, those conflicts ought to be settled.

Senator **Mathias**. Of course, that is a view that Justice White has expressed very forcefully and very frequently.

Justice **Rehnquist**. Yes, it is.

Senator **Mathias**. On a number of occasions, Justice White has dissented from a denial of certiorari because of intercircuit conflict. But you have very rarely joined in those dissents.

Are there other cases that you think the Court ought to be deciding?

Justice **Rehnquist**. Yes. We have, for instance, constitutional decisions. I can't be any more specific than that, just because none occur to me right now, coming from all of the 13 Federal Courts of Appeals, and petitions coming from 50 of the State courts.

Now, some of them are not significant questions, but some of them are significant. I also have the view that any constitutional decision has a significance all its own, by whatever court made. So I think with due regard for the limits of the court on the number of cases it can decide, I have felt that cases like that, perhaps, were—should have a higher priority than a simple statutory conflict.

Senator **Mathias**. In that connection, Prof. Arthur Hellman has noted that during the last eight terms—and I'm quoting Professor Hellman—"Justice Rehnquist has published a dissenting opinion or notation in more than 120 cases in which the Court has denied review. By far the largest number of these, more than half of the total, consisted of civil rights cases which the lower court had ruled in favor of the constitutional claimant."

Professor Hellman draws from that the conclusion that you would like to devote increased decisional capacity to a more searching scrutiny of cases in which the lower courts have found merit in a civil liberties claim.

Would you say he was right in that conclusion?

Justice **Rehnquist**. If you mean by a civil liberties claim, Senator, a claim in which the, say, criminal defendant is raising a constitutional defense to his sentence or trial, that has been sustained by the lower court, I think that's an accurate statement——

Senator **Mathias**. You say an accurate statement?

Justice **Rehnquist**. It's an accurate statement. Because in reading some lower court decisions that come to us on petition for certiorari, I occasionally get the sense that some of their decisions don't conform to the constitutional law in the area that our Court has laid down.

Senator **Mathias**. Would you have the same view of the decisions of State courts in this area?

Justice **Rehnquist**. If the State court decided a Federal question, probably yes.

Senator **Mathias**. That's all I have at this time, Mr. Chairman.

The **Chairman**. Thank you, Senator.

The distinguished Senator from Alabama.

Senator **Heflin**. I have no questions at this time.

The **Chairman**. The distinguished Senator from Utah.

Senator **Hatch**. Thank you, Mr. Chairman.

Justice Rehnquist, there are a number of items brought up by the other side that need to be clarified. I will take a few minutes on some of those.

Senator Metzenbaum, for instance, read a quote from a letter that is about 20 years old, long before you became a Justice. He did not read the whole quote, which, of course, I have to take issue with. I think you would, too.

He read from an article by you entitled, "De Facto Schools Seen Serving Well." He read the following part of a sentence: "We are no more dedicated to an integrated society than we are to a segregated society" and stopped there. Let me read the whole sentence.

"We are no more dedicated to an integrated society than we are to a segregated society, than we are, instead, dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities."

The next sentence says, "The neighborhood school concept, which has served us well for countless years, is quite consistent with this principle."

That is quite a far cry from the partial quote that Senator Metzenbaum hit you with a little while back. The full quote clarifies that you never endorsed segregation but, instead, endorsed a "free society", to use your terms, where "each man is equal before the law."

I want to bring that up for everybody's attention because it is impossible to find anything in your writings other than a ringing endorsement of equality before the law. That is typical of what you have been suffering for the last couple of days.

The letter proceeds to show that this concept is furthered by a race-neutral assignment of students to neighborhood schools. In this principle, the Senate agrees with you. It has voted several times over the years for this principle. This Committee has also voted for it. I would like to make the record clear on what I consider to be a misquote of what you had really said.

Let me go to another area that was brought up as well. A few moments ago we heard that you wrote a memo to Mr. Justice Jackson, a great former Justice. In that memo it contained this sentence—and, I might add, I have a copy of it right here. It's an interesting memo. It is regarding "Re Opinions of Black and FF"—meaning Felix Frankfurter, I take it "—in *Terry* v. *Adams*." Then you start at the top, "If you're going to dissent, I should think you might combine the ideas which you expressed last week—" et cetera.

Then you say, No. 1, "Black", and you pretty well synopsize what Black's position was, and then "FF", meaning Felix Frankfurter, I take it—Is that correct?

Justice REHNQUIST. Yes.

Senator HATCH. You then say what his position was. And then, No. 3, you then entitle this "your ideas."

Now, who did you mean by that?

Justice REHNQUIST. Justice Jackson.

Senator HATCH. You're saying "I'm summarizing your ideas?" Is that right?

Justice REHNQUIST. I think so.

Senator HATCH. When you say "your ideas," you mean that the view that there was no State action was Jackson's. Isn't that true?

Justice REHNQUIST. I don't have it immediately before me, Senator, but that conforms to my recollection.

Senator HATCH. I take it from the memorandum that Mr. Justice Jackson was considering a dissenting vote at the time you wrote the memo.

Justice REHNQUIST. I have no recollection of this memo or any other memo, except to note they were typed by me. Certainly, the memo makes it appear that he was contemplating a dissent at that time.

Senator HATCH. Is it a unique occurrence for a Justice initially to take such a view and then change his mind?

Justice REHNQUIST. No; not at all.

Senator HATCH. That has happened to you, I take it?

Justice REHNQUIST. Yes; it has.

Senator HATCH. Has it happened to other Justices you know of?

Justice REHNQUIST. I could say I believe it has. I would have to know more about my colleagues——

Senator BIDEN. I think you're leading the witness.

Senator HATCH. I am leading the witness. It is really a life long ambition of mine to lead a Supreme Court Justice. [Laughter.]

It seems the only question in this case was whether there was State action. There was no question that a State's discrimination against blacks was unconstitutional. There was no question that purely private conduct could not violate the 14th or 15th amendments.

Am I correct, that this case merely presented the question of State action?

Justice REHNQUIST. I believe you are, Senator.

Senator HATCH. The only question was whether the private club involved in the case was the "State" within the meaning of the Constitution. Is that correct?

Justice REHNQUIST. As I recall, it was.

Senator HATCH. Wasn't Mr. Justice Jackson's initial view a private club cannot be a "state"?

Justice **Rehnquist**. I can't answer now as to what Mr. Justice Jackson's original view was. I think the memo indicates that that was his view.

Senator **Hatch**. You say, "Your ideas."

Justice **Rehnquist**. Yes.

Senator **Hatch**. As I read your memos they clearly indicate that you personally find private as well as public discrimination ugly. Is that correct?

Justice **Rehnquist**. Yes.

Senator **Hatch**. Your memo clarifies that the Constitution clearly does not allow a State to use its authority to discriminate or segregate. Is that correct?

Justice **Rehnquist**. Yes.

Senator **Hatch**. This seems to approve of the *Brown* ruling and clarifies your views on eradicating State-sponsored discrimination. Is that correct?

Justice **Rehnquist**. As to approving of the *Brown* ruling, I think *Brown* might have been argued but I don't believe it had come down. I think this was——

Senator **Hatch**. But it indicates that your mind was certainly in the vein of approving the *Brown*——

Justice **Rehnquist**. Oh, sure. The 14th amendment prohibited discrimination.

Senator **Hatch**. As described, were Justice Jackson's views, that "we should not let the states to permit a private practice result in manufacture of a bad law and hold that a private club is a 'state' ". Were those basically his views at the time, to the best of your knowledge?

Justice **Rehnquist**. Reconstructing from this memo, I would certainly say so.

Senator **Hatch**. This is not even controversial law today. For example, in *Moose Lodge 107* v. *Trivis,* the Court held that a private club which refuses to serve blacks, or refused to serve blacks, was not subject to the 14th amendment, because it remained the club and not the State that was responsible for the discrimination. Is that correct?

Justice **Rehnquist**. Yes; I think it is, Senator.

Senator **Hatch**. Is it correct that you do not think it is desirable for anyone to engage in racial discrimination under any circumstances?

Justice **Rehnquist**. Yes; that is absolutely correct.

Senator **Hatch**. That is uncategorically your position?

Justice **Rehnquist**. Yes; it is.

Senator **Hatch**. And it has been since you have been on the Court?

Justice **Rehnquist**. Yes; and for a lot longer than that.

Senator **Hatch**. In *Terry* v. *Adams* it was Mr. Justice Jackson's opinion that the only issue was whether the club in question was engaging in State action and whether that is subject to the dictates of the Constitution. Is that a fair summary?

Justice **Rehnquist**. I think it is.

Senator **Hatch**. This demonstrates that we have people who are going over the same ground that was plowed back in 1971, distorting the very same memoranda that existed then, and not reading it very carefully, trying to attribute ideas to you that you really have never had. That has been typical of some of the questioning that you have had to undergo. I empathize with you.

In any event, you made it clear. I personally resent anybody trying to imply that you do not believe in civil rights after listening to your testimony and after reading your opinions through all these years. I wanted to clarify the record and make it clear just exactly where you do stand.

I again ask for fairness by our committee in treating a man whom I consider to be a very fine Justice, and whom many others do as well.

Thank you.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Justice Rehnquist, my time expired when I was about to say that I respectfully disagreed with the distinction you were making between what a Senator had a right to ask and what a Supreme Court nominee ought to answer. I would go back to the memorandum of Judge Reese, with your language, albeit in 1959:

> Given the state of things in March of 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process. The only way for the Senate to learn of these (views) is to inquire of men on their way to the Supreme Court something of their views on these questions.

Now, that statement by you, albeit in 1959, states specifically that the nominee ought to respond to the questions, doesn't it?

Justice REHNQUIST. I didn't hear it in what you read.

Senator SPECTER. Well, I'll repeat it. This is what you said: "Given the state of things in March of 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process." It was important to the Senate to get Justice Whittaker's views so that the nominee had a duty, or at least ought to have made those views known to the Senate.

Justice REHNQUIST. I think that's your addition, isn't it, Senator? I mean, did I say that?

Senator SPECTER. Yes.

Justice REHNQUIST. That the nominee ought to respond?

Senator SPECTER. Yes; that's the import of it. Yes; that the nominee ought to respond.

Justice REHNQUIST. It's funny, I don't have a—that is what I said at that time?

Senator SPECTER. I have a document of the hearings of the Committee on the Judiciary, on the nomination of Sandra Day O'Connor, and it is a memorandum prepared by Grover Reese, who was Senator East's counsel. He quotes a statement attributed to you that says the Senate was entitled to Justice Whittaker's views on equal protection and due process.

Justice REHNQUIST. Well, certainly, that is the fair import of the statement, just as you say. I don't think I appreciated, at the time I wrote that, the difficult position that the nominee is in. If you will read over some of these other confirmation hearings, I think you will see that other nominees have felt just as I have about the sort of question that you want me to answer.

Senator **Specter**. Well, there is authority that Justice Marshall would respond to questions, unless it was a specific case that was going to come before the Court. Justice Powell responded to questions on busing. There have been responses.

But what I don't understand, Mr. Justice Rehnquist, is, having said that you thought that Congress could not take away the jurisdiction of the Court in first amendment cases involving speech, press, and assembly. What is your reluctance in saying, that the Congress could not take away the jurisdiction of the Supreme Court to decide cases, for example, on right to counsel?

Justice **Rehnquist**. Well, perhaps the distinction isn't as clear as I would like it to be, but I think there is some distinction. The Court has often referred to the first amendment as the preferred freedom, the indispensable matrix of a democratic society. I think that really is the guts, probably the thing that is the necessary prerequisite for effective democratic government.

As important as many of the other constitutional guarantees are, I don't think they have quite that same importance in that context.

Senator **Specter**. Are you saying that it might be possible to take away the jurisdiction of the Supreme Court of the United States to decide some issues relating to constitutional rights?

Justice **Rehnquist**. When you say—you mean that I, as a Justice, might possibly vote that that was a proper congressional action?

Senator **Specter**. Yes.

Justice **Rehnquist**. Senator, I don't believe I can answer that question. It would depend on briefs, arguments, and the like. The nominees before this committee have been, I think, quite steadfast in refusing to answer a question, which I believe from your question, you say bills have been pending in Congress to do that.

The **Chairman**. Well, I support you in that position. You cannot express yourself on matters that you anticipate will come before the Court.

Senator **Specter**. I strongly disagree with the distinguished Chairman. I believe there is nothing to *Marbury* v. *Madison* and the power of the Supreme Court of the United States to decide constitutional issues if there is any possibility of taking away the jurisdiction of the Supreme Court of the United States to decide any constitutional issue.

I do not think that there is any distinction as to the power of the Court on first amendment issues as opposed to fifth amendment issues, or as opposed to sixth amendment issues, or as to any constitutional issues.

If the Constitution and the power of the Supreme Court to interpret the Constitution, which the Congress and the President must follow means anything, then I see no way that Congress has the authority to take away the jurisdiction of the Supreme Court to decide a constitutional issue.

And if you have a question about that, it troubles me very, very much.

Justice **Rehnquist**. Senator, it is not that I have a question about it. It is the idea that, as you posit it, it is based on pending legislation in the Congress that could well come before the Court.

I think the precedents of many nominees before me foreclose me from answering.

Senator **Specter**. Well, I know of no legislation in the Congress today which opposes that issue.

However, in 1982 the Senate passed legislation taking away the jurisdiction of the Supreme Court of the United States. That is why I am so concerned about it today.

I think it is necessary that it be clearcut that members of the Supreme Court, especially the Chief Justice, would firmly believe that their power to decide constitutional issues could not be undercut by Congress.

If there is any way that you distinguish the first amendment issues, which you have already answered, from the balance—I repeat, it troubles me. But, I am going to go on to some other questions.

Mr. Justice Rehnquist, on the subject of the scope of the incorporation doctrine, I had started asking these questions before. You commented that as to the first amendment, the free exercise of religion was incorporated by the due process clause of the 14th amendment. You started to make a distinctions with respect to the establishment clause.

Is there any question in your mind that the due process clause of the 14th amendment incorporates freedom of speech?

Justice **Rehnquist**. Other than the point I made yesterday. It, obviously, incorporates freedom of speech. I took the position in a couple of opinions I wrote in following Justice Jackson and Justice Harlan that some of the details might be different as applied against the States as opposed to the Federal Government.

Senator **Specter**. Would you repeat the distinction you see as to the scope of the due process clause incorporating the establishment clause of the first amendment?

Justice **Rehnquist**. No; I think that is settled by the *Everson* case.

Senator **Specter**. All right.

There is no question that the due process clause of the 14th amendment incorporates freedom of the press under the first amendment?

Justice **Rehnquist**. I do not think so.

Senator **Specter**. Are the right of assembly and petition incorporated by the due process clause of the 14th amendment?

Justice **Rehnquist**. Yes; I think they are.

Senator **Specter**. Is the search and seizure clause of the fourth amendment incorporated by the due process clause of the fourteenth amendment?

Justice **Rehnquist**. That was held in *Mapp* v. *Ohio*.

Senator **Specter**. Do you agree with that? Do you believe it is a decided matter?

Justice **Rehnquist**. It is certainly a settled matter, yes.

Senator **Specter**. Is double jeopardy under the fifth amendment incorporated in the due process clause of the 14th amendment?

Justice **Rehnquist**. I think that was in the—Senator, I am going to draw back a little. Because in a case like *Benton* v. *Maryland* that came to the Court where—before I got there. I did not participate in that case. I have followed *Benton* v. *Maryland* many times when I have been on the Court. But to say whether I agree with a case that was decided before I came on the Court, I think it is better to phrase it that my record in voting on the case has certainly shown that I have followed that case.

Senator **Specter**. Well, I am not asking whether you agree with it. I am asking whether you consider it a settled issue that the incorporation doctrine covers that issue.

The concern I have is whether the incorporation doctrine is going to be undercut. Although, I do not think that you and I have any difference of opinion on this, I just want to be sure.

Justice **Rehnquist**. I think in a case—I cannot remember—a case coming up from Montana, I took the—Justice Stewart joined my opinion, I joined Justice Stewart's opinion—saying that some of the nuances of the double jeopardy clause should not apply the same to the States as to the Federal Government.

I think this was a case involving when the trial started, for the purposes of—when jeopardy attached. And the rule in the Federal cases was when a witness is first sworn. But Montana had a wholly different procedure. And it just seemed that a fair translation of the Federal rule to the State rule would not give you an identical situation.

The **Chairman**. Senator, I believe you have gone overtime.

Senator **Specter**. Thank you, Mr. Chairman.

The **Chairman**. I believe the distinguished Senator from Alabama said he had no more questions?

Senator **Heflin**. Not at this present time.

The **Chairman**. The distinguished Senator from Illinois said he had no more questions.

Senator **Simon**. I know it is a great disappointment to you, Mr. Chairman.

The **Chairman**. And now it goes back to the distinguished Senator from Delaware.

Senator **Biden**. Thank you very much.

Mr. Justice, would you like a Coke or a coffee or something?

Justice **Rehnquist**. No; I think I am OK, Senator. Thank you.

Senator **Biden**. OK.

I would like to continue to pursue the line we were discussing earlier.

You have written in an article that has been referred to earlier, "The Notion of a Living Constitution," 1954 Texas Law Review, 699, page 700, 1976, and I am going to read a portion of it.

You say:

> I certainly doubt that even leaders of the radical Republicans in Congress would have thought any portion of the Civil War Amendments, except Section 5 of the Fourteenth Amendment, was designed to solve problems that society might confront a century later. I think that they would have said that those amendments were designed to prevent from ever recurring abuses in which the states had engaged prior to the time.

Now, that—first of all, do you recall that proposition you stated?

Justice **Rehnquist**. Sir, I remember giving a speech. I do not doubt that that is in it. I do not recall that offhand.

Senator **Biden**. But the thrust of it is consistent with, as I read your cases and all your other speeches, everything that you have said from the time you were a law clerk until now, which is basically that the Constitution should be interpreted by you in a more limited fashion than it has been by other Justices that you have sometimes been critical of.

Justice **Rehnquist**. Yes, I think that is correct.

Senator **Biden**. Now, if we go back to the 14th amendment and section 1 particularly, which relates to due process and equal protection, and examine it in light of the expansion of the standard which a black person has to meet and the standard that a woman has to meet, if you examine those standards in light of your assertion that the framers, even those radical Republicans, did not write the amendment in an attempt to design problems which society had not yet confronted.

I am curious as to, again, how you arrive at these two different standards, for black and for women, if you are willing to extend the standards for blacks to others than black. If you extend it all to any other race, as the Court has done and you have implied in the—was it the——

Justice **Rehnquist**. *Yic Wo*.

Senator **Biden**. The *Yic Wo* case. Which was, what, 1948, or somewhere in that area?

Justice **Rehnquist**. 1885, I think.

Senator **Biden**. Yic Wo was 1885. Then obviously, it was before you were there. [Laughter.]

But do you agree with the holding in *Yic Wo*?

Justice **Rehnquist**. Yes.

Senator **Biden**. So you agree that the 14th amendment was meant to cover more than blacks?

Justice **Rehnquist**. Yes.

Senator **Biden**. OK, now when we move on to women, there are three categories the Court has used, three standards, as I understand it.

One is the suspect category—not with regard to women, but with regard to any interpretation—with regard to the standard of application of section 1 of the 14th amendment, there are three standards: the suspect category, or strict scrutiny; that is one. And the semicompelling category, which was used in the—which case now, I am going to make sure I am going to get this right—*Frontiero*, was it?

Justice **Rehnquist**. I think maybe, *Frontiero*, yeah.

Senator **Biden**. *Frontiero*.

Justice **Rehnquist**. And I think *Craig* v. *Boren*.

Senator **Biden**. And then the rational basis test.

Now, the Court had used—other members of the Court had used the suspect category classification in the *Frontiero* case to be applied to women, right?

Justice **Rehnquist**. It may be that some other members of the Court did. The full suspect classification, compelling state interests rule. I am not sure of that.

Senator **Biden**. In your dissent in *Craig* you write: The Court's disposition of this case is objectionable on two grounds. First, it is the conclusion that men challenging a gender-based statute which treats them less favorably than women may invoke a more stringent standard of judicial review that pertains to most other types of classification. Second is the Court's enunciation of this standard, without citations to any source, as being that, quote, classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives, end of quote.

The only redeeming feature of the Court's opinion in my mind is that it apparently signals a retreat by those who joined the plurality opinion in the *Frontiero* v. *Richardson* from their view that sex is a suspect classification for purposes of equal protection analysis.

I think the Oklahoma statute challenged here need pass only the rational basis equal protection analysis expounded in cases such as *McGowan* v. *Maryland* and *Williamson* v. *Lee,* et cetera. determine whether or not women can fall within, meet the standard required, for the equal protection clause of section 1 of the 14th amendment, you picked the lowest standard, the hardest standard to meet, the rational basis test.

Justice REHNQUIST. In *Craig,* yes.

Senator BIDEN. Have you ever used any other standard relating to women other than a rational basis?

Justice REHNQUIST. I think in the *Hogan* case—I am not sure of this, but I think in the *Hogan* v. *Mississippi* case some 3 or 4 years ago I was in dissent. But I have a feeling either my opinion or the opinion I joined suggested that there was a higher standard than simply pure rational basis.

I am not certain of that.

Senator BIDEN. And why was that? Why the change in standards?

Justice REHNQUIST. Well, the sex discrimination cases had been before the Court for a long period of time. And it was treated strictly as rational basis. I think up until the time of *Reed* v. *Reed,* in about 1971. And there, without naming any level of scrutiny, as the cases say, the Court struck down a statute that discriminated between men and women.

And in the intervening time, I think the Court and various Justices have taken different positions, is just trying to settle in on a standard that will govern discrimination between men and women.

A plurality, as you point out, in *Frontiero,* had said this is just like discrimination against blacks. But then members of that plurality settle back in *Craig* v. *Boren* for a more middle-level thing. Whereas I had said in *Craig* I thought rational basis applied, I think in at least one case I have written or joined since then, I have intimated that something more perhaps than rational basis——

Senator BIDEN. The reason why I keep pursuing it relates not so much to your well-stated, if we characterize the *Frontiero* case—or the rationale in *Craig* as a withdrawal to a more moderate, to use your phrase, standard—it is clear that you have had the more conservative standard most of the time. And I am not arguing with that, whether or not that is right or wrong.

I am trying to figure out how, if you acknowledge that this is, if you will, a moving target, that the standard is evolving or changing, one way or another; but it is evolving or changing. And the rational basis standard, at the outset, was an interpretation, an evolving of an interpretation of the 14th amendment. It was not written in the 14th amendment.

If you acknowledge that, how can you not acknowledge that the Constitution is a living, breathing document, that the standards do change as circumstances change and times change?

Justice REHNQUIST. Well, Senator, much depends on what you mean by a living breathing document.

If you mean that——

Senator BIDEN. I will be more precise: a living Constitution, as you used it in your speech.

Justice REHNQUIST. Again, it depends on what you mean by a living Constitution.

Senator BIDEN. Let me be precise. Living Constitution means that—as you were referring to it—is that, as I understand having read your whole speech, that a living Constitution is one that in fact is designed to deal with abuses that in fact the State did not engage in prior to the time of the amendment.

In other words, you were making the argument that—in that speech that if the State had not engaged in this abuse, how could it have been contemplated to be covered by the amendment. Therefore, when you are interpreting the amendment, how could you in fact stretch it to apply to what the framers did not intend?

And those who say, living, they say, stretch it. You say do not stretch it.

Justice REHNQUIST. Well, I cannot put the speech right back in my mind, but perhaps I can tell you now——

Senator BIDEN. I do not care about the speech. It is more what you think.

Justice REHNQUIST. Well, and again, speaking in generalities, when you are dealing with something like the equal protection clause, which I think is a good example, it came about because of particular evils that were inflicted on newly freed blacks after the Civil War.

But Congress, in attempting to protect these people constitutionally, used very, very general language. No person shall be denied equal protection of the laws.

And it is fair to believe that that should be, for that reason, extended to people other than the particular group who was to benefit from it and who may have been the cause of the amendment into a principle of law that applies to, very broadly speaking, similarly situated people.

The fact that there may be things that would be covered by the fair meaning of the equal protection clause, practices that were never started or had never occurred in 1868 certainly is not a reason, I think, for not applying the equal protection clause.

Senator BIDEN. But sir, in fact, the document is not nearly as static. Because, obviously, the rational basis test came about as a way to deal with the claim that women were protected in the same way, that blacks were protected under the 14th amendment. And one test arrived at was rational basis.

Now, others came along and said, no, the rational basis is too conservative a basis upon which to do it. We should in fact expand that test, if you will—expand, change, alter—to a more liberal, if you want to use the phrase, interpretation of what test should be applied.

And then the Court moved again, and it said, well, it could be argued in *Craig* v. *Boren*, maybe we should take the more moderate test to determine whether or not it applied.

The only point I am making is that the rational basis test as well as the strict scrutiny test were in fact interpretive judgments made by sitting Justices as to the extent to which the 14th amendment should go.

Justice REHNQUIST. No question about it.

Senator BIDEN. And you clearly are of the view that it should not go as far as others think it should go. But I do not imagine you would criticize those who say it should go further than you believe. You cannot really criticize them on the grounds that they are tampering with an intention that was clearly set in stone back when the amendment was passed.

You tamper as much as they tamper, right?

Justice REHNQUIST. I would not say wholly right. But there is certainly something to what you say. If you are talking about people who go beyond the positions I have taken, and simply say that everything that bothers them should be a suspect classification. I do not suggest that any of my colleagues have taken that position. There, I think you would have an example of simply—of fitting the equal protection clause to reject your own personal dislikes or institutional factors that you dislike.

Senator BIDEN. But do you not do it to in fact reject things you dislike?

Justice REHNQUIST. No, it is not based on dislike.

Senator BIDEN. Well, I used the phrase you used. I mean, do you not apply your philosophy as to the role of women in society to how you read that amendment? You clearly do?

Justice REHNQUIST. No, I am not sure I agree with you, Senator.

You know, you cannot get away from your philosophy, or whatever, as judge. But I think a judge should make a conscious effort not to simply bring his own philosophies.

Senator BIDEN. I do not want to argue with whether you are right or wrong.

You know, back at the turn of the century, the big debate about whether Austin and Kant were right about natural law, and then Pound and Llewellyn came along with their view about, you know, sociological jurisprudence. And remember that, when you had to study that about Pound's analogy that he made was, it was like cumulous clouds and there were certain principles that move just like cumulous clouds, move out beyond your range, and another moves in. The law has to adjust as your vision adjusts. And then you come along with Frank and his book, "Law and the Modern Mind," which was sort of the seminal piece written on whether or not we really are legal realists or not. And there has been a debate that goes back and forth.

And I just want the folks out there to understand——

The CHAIRMAN. Your time has gone way over.

Senator BIDEN. OK. Well, I will stay here until midnight until I get a chance to ask all my questions. So I will wait. I will come back to Llewellyn, Pound, Frank, and the rest.

The CHAIRMAN. The senior Senator from Maryland.

Senator MATHIAS. I pass at this time.

The CHAIRMAN. The senior Senator from Alabama.

Senator HEFLIN. I reserve until later.

The CHAIRMAN. The senior Senator from Nevada.

Senator LAXALT. I yield my time, Mr. Chairman, to the distinguished Senator from Pennsylvania.

The CHAIRMAN. The senior Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman. Thank you, Senator Laxalt.

I just have a few more questions for Justice Rehnquist.

I had gone through a number of the provisions of the Bill of Rights on the incorporation doctrine, Mr. Justice Rehnquist, because I think it is important to lay to rest the conclusion that the 14th amendment due process clause does incorporate certain provisions of the Bill of Rights.

I have only gone over the ones which have been incorporated. I have not gone into the ones which have not been, because I do not want to move into a lot of areas of the law which are not settled.

There are two remaining areas I want to ask you about. Do you regard it as settled law that the speedy trial provision is incorporated under the due process clause of the 14th amendment?

Justice REHNQUIST. Yes, I think that is settled law, and my opinions reflect it.

Senator SPECTER. What about the cruel and unusual punishment provision of the eighth amendment, is that incorporated into the due process clause of the 14th amendment?

Justice REHNQUIST. Again, my opinions reflect the fact.

Senator SPECTER. Mr. Justice Rehnquist, as you see the concerns I have are the authority of the Court, as decided in *Marbury* v. *Madison,* court-stripping, and the provisions of the Bill of Rights which are incorporated under the due process clause. There may be other provisions, and I suspect they will unfold when the Court gets to other issues.

I want to take up a final subject with you; that is stare decisis, which is where the distinguished chairman started off.

I asked you questions about staying with the established principles. He asked you why so many cases had been reversed. You made a comment that the docket now reflects a great many more constitutional issues.

When you testified in 1971 you had made the point that if there is a long-standing decision, which is unanimous, it is more likely to be as an established precedent which is not to be overturned.

You said in one of your comments, page 169, that, "Again, an 8 to 1 decision is not one likely to be disregarded, but nonetheless, if upon reexamination, given the weight that you ought to give to a precedent, it appears wrong, then it is wrong. But 8 to 1 is a very substantial, weighty consideration on changing a precedent."

There has been a great deal of concern expressed about the numerous cases where you were the sole dissenter. Without getting into whether that is good, bad, or indifferent, the question that I have is whether you would, as Chief Justice, and the extra prestige of that position, assert your position as the sole dissenter against eight other Justices, or whether you would regard those decisions, even though you dissented at the time they were made, as precedents to be followed by the Court?

Justice **Rehnquist**. I think certainly precedents to be followed under the standards I earlier indicated, to which you referred.

Now, I think it is unsettling, also, to the—sometimes to the country, if it is a big enough situation, but always to the profession and to courts who have to apply the case, to have a case overruled. And cases have been overruled, there is no question.

But I think as an institutional matter, the Chief Justice, probably has something of an interest in seeing that there is stability in the law.

Senator **Specter**. Thus, there need not be a concern in the numerous cases where you were the sole dissenter, that you will utilize your new position to try to establish that as the ruling of the Supreme Court?

Justice **Rehnquist**. I have not been over every one of them, Senator. If there was a particular issue that I felt very deeply, after having reviewed the majority opinion and my own, and it was a constitutional issue, I certainly might feel obligated under my oath as Chief Justice to continue to vote for that position.

But unless it were of that stature, I certainly would feel the other way.

Senator **Specter**. Thank you very much, Mr. Justice Rehnquist.

Thank you, Mr. Chairman.

The **Chairman**. Thank you.

The distinguished Senator from Illinois?

Senator **Simon**. I have no questions.

The **Chairman**. The distinguished Senator from Delaware.

Senator **Biden**. Thank you.

The **Chairman**. We will take a recess for 10 minutes.

[Brief recess.]

The **Chairman**. The committee will come to order.

The distinguished Senator from Ohio.

Senator **Metzenbaum**. Mr. Justice, you said earlier that a statement in your clerk memo on the *Terry* v. *Adams* case represented the views of Justice Jackson.

Did you, in all of the time you worked with Justice Jackson, ever hear him say something like the following: It is about time that the Court faced the fact that the white people in the South do not like the colored people?

Justice **Rehnquist**. I simply cannot recall at this stage, Senator.

Senator **Metzenbaum**. Well, I understand. I do not expect you to remember whether he said that specific kind of thing. But the point is, did Justice Jackson ever voice any ideas like that, that white people in the South do not like the colored people?

Justice **Rehnquist**. I simply cannot recall at this time.

Senator **Metzenbaum**. Was that not Rehnquist's statement rather than Jackson's statement?

Justice **Rehnquist**. If the memo you are referring to is the *Terry* v. *Adams* one that we discussed earlier, that may have been a paraphrase. It did not purport to be a literal transcription of what Justice Jackson had told me of his ideas. But it certainly was a reflection of them, and an accurate reflection of them I would have thought.

Certainly not necessarily and precisely the language.

Senator **METZENBAUM**. Is that the way Justice Jackson felt about white people's attitude toward black people in the South?

You worked for him how long?

Justice **REHNQUIST**. A year and a half.

Senator **METZENBAUM**. Is that the way he felt about white people's attitude toward black people in the South?

Justice **REHNQUIST**. That white people in the South did not like black people?

Senator **METZENBAUM**. Yes.

Justice **REHNQUIST**. I simply cannot remember.

Senator **METZENBAUM**. In citing your statement in your letter regarding the Phoenix school desegregation plan, I think you suggested I took your statement out of context. If that be the case, I would like you to point out to me how I did so, and if you want me to, I will be happy to read the entire letter that you wrote, because I never willfully took anybody's statement out of context. And I do not think I took yours out of context. And so I would like to have you clarify for me in what manner it was taken out of context.

Justice **REHNQUIST**. Senator, I was asked about that, I believe by Senator Hatch, afterward, and he pointed out that after the words, leading to a segregated society nor to an integrated—but to a free society in which each person is equal under the law. And then there is another phrase added which I cannot remember.

Senator **METZENBAUM**. That each man is accorded a maximum amount of freedom of choice in his individual activities.

Justice **REHNQUIST**. Yes.

Senator **METZENBAUM**. And with that, there is no question those are your views?

Justice **REHNQUIST**. There is no question those were my views at the time.

Senator **METZENBAUM**. And do you still believe that we are no more dedicated to an integrated society than we are to a segregated society.

You think this Nation is not more dedicated to an integrated society than it is to a segregated society?

Justice **REHNQUIST**. I think generally it is more dedicated to an integrated society than to a segregated society, where you are talking about any sort of legal action or any sort of government-sponsored activity.

Senator **METZENBAUM**. Your letter to the editor—I guess it is a letter to the editor, or else it is an article; I am not sure—"De Facto School Seen Serving Well"—indicates that you find it sort of coequal, that you can have a segregated society just as well as having an integrated society.

And if you are a black person or you are an Asian or you are an Indian, or whatever, would you not be offended by knowing the Chief Justice of the Supreme Court felt that we are no more dedicated to integrating our society than we are to segregating it?

Justice **REHNQUIST**. Certainly phrased the way you do, yes, I would be. But I think the statement was also made in the context of a proposal for fairly extensive busing of kids that would have pretty well torn up the neighborhood school system.

Senator **Metzenbaum**. As a matter of fact, I do not think there is any mention of busing in this whole letter, although I could be wrong. There is some mention of the neighborhood schools concept.

They assert a claim for special privileges for the minority, the members of which in many cases may not even want the privileges which the social theorists urge be extended to them.

That is the age-old argument that we whites really know what is better for those blacks. Is that not what you are saying?

Justice **Rehnquist**. I do not think it is, Senator.

I think it was the idea that some of the blacks would not have wanted their children bused.

Senator **Metzenbaum**. Well, this is not talking about busing. This is talking about special privileges for the minority.

Justice **Rehnquist**. Well, Senator, one of the superintendent's proposal, I think, to which I was objecting—again, it is 20 years ago—was one in which he said that busing was a possibility, or he would not rule out busing.

Senator **Metzenbaum**. Well, I will not carry that on.

I want to return to your decisions in the race cases, and the equal protection clause, because I think, Mr. Justice, in considering you for confirmation, I believe that we have to take the totality; not alone a letter, not alone a memo, or not alone some article. We have to take a look at the totality of your activities, and your Court decisions.

I believe that part of our responsibility is to assure every person in this country, whether white or black or whatever color, regardless of whatever religion that person may have, or even if that person has no religion, whether rich or poor, that this man should be the Chief Justice of the United States.

No question, you are on the Supreme Court, and you want to remain there. But I think we constantly fight a battle in our country to see to it that people have confidence in their Government. And we do not do too well, because people do not have that much confidence in their Government. And that includes in the Congress in which I serve; the Presidency; the Supreme Court.

And I think one of the toughest issues that face us has to do, not alone with your decisions, but with your expressed personal views before you were a member of the Supreme Court.

I have previously mentioned that minorities, blacks, and other minorities were not comfortable about your past history when you were first appointed to the Court.

And the question now is: Can they feel more or less comfortable upon your ascendancy to the position of Chief Justice.

Frankly, I would like to accept your representation about your impartiality. But frankly, your record since you have been on the Court still makes me, and large groups of racial minorities from whom we will hear later this evening, uncomfortable about your commitment to racial equality. You dissented from the important decisions which have given practical meaning to *Brown* v. *Board of Education*. And then you also dissented in the *Battson* case.

Now in the *Battson* case the Supreme Court said that a prosecutor who removed all blacks from a jury, trying a black defendant, must explain that conduct. The Supreme Court said that the explanation cannot be based on their race, but must be based on some reason other than race.

It is a very significant point, the prosecutors removing all blacks from the jury. The black defendant is understandably concerned. And so the case went to the Supreme Court, and the Court said that public respect for the criminal justice system, and the rule of law will be strengthened if we insure that no citizen is disqualified from jury service because of race.

And we know that you dissented. I think you were the sole dissent in that case.

Justice REHNQUIST. I think the Chief Justice joined in that.

Senator METZENBAUM. Now, in your dissenting opinion, you said prosecutors often object to black jurors based upon seat-of-the-pants—let me read you, because I think I was cutting a portion too short.

In my view, there is simply nothing unequal about the State using its peremptory challenge to strike blacks from the jury in cases involving black defendants so long as such challenges are also used to exclude whites in cases involving white defendants; Hispanics in cases involving Hispanic defendants; Asians in cases involving Asian defendants; and so on.

Mr. Justice, I do not want to belittle your opinion, but isn't it rather sophomoric to say that whites can be excluded in cases involving white defendants. That is just unrealistic. Ninety percent of this country is white.

And so to say that some prosecutor might be excluding whites from the jury in the case of white defendants, and they did that with respect to Asians in connection with Asian defendants, then there would be nothing wrong with their doing that to blacks being excluded from the jury in the case of black defendants.

Could any black possibly accept that line of reasoning, knowing that he lives, or she lives, in a 90 percent white society in America, and think that that is fairness?

Justice REHNQUIST. Senator, I set forth my reasons in my opinion. I realize you disagree with them, but I do not think I should be in the position of defending it any further than what I stated there.

Senator METZENBAUM. Well, I might say to you, Mr. Justice, I have noticed that when the chairman had some questions to you earlier today about some of your decisions, you were much less reluctant to discuss the decisions and the substance of the decisions, and I actually made some note of that fact and probably could find the note around here.

The CHAIRMAN. Senator, excuse me, but I do not believe I have asked him any questions today.

Senator METZENBAUM. Well, if it was not today, then it was yesterday. I may stand corrected on that. But I think you did ask him today, didn't you?

The CHAIRMAN. No.

Senator METZENBAUM. We will not quibble about whether it is today or yesterday. It seems like an eternity we have been here, so I will not worry about——

The CHAIRMAN. It is the third day we are in session now on this nomination. That is right.

Senator METZENBAUM. Put yourself in the position of blacks of America, some of whom are in this audience, some of whom are watching this on TV, and they say, "Well, he's wonderful. He doesn't mind blacks being excluded from juries in which there are black defendants as long as whites are excluded from juries in which there are white defendants. Who is he kidding?" And I guess I cannot believe that you would not want to expand upon what you said in that case.

Justice REHNQUIST. I do not believe I should expand on it, Senator, for the reason I said, but I would add that what I said was the law laid down by the majority of the Supreme Court in a case called *Swain* v. *Alabama,* in 1966, when some of my present colleagues were on the Court and voted that, voted that way. So, it was no novel idea on my part. The rest of the Court decided to overrule that case. I did not feel it should be overruled.

Senator METZENBAUM. Mr. Chairman, I do not have any further questions of this witness, but I was one of those who joined with Senator Kennedy in connection with the issue of the documents. Have we received any further word from the Office of Legal Counsel as to whether those documents——

The CHAIRMAN. We have not yet. I think you will pretty soon.

Senator METZENBAUM. We will. All right. I think that it is something that we ought to deal with as promptly as it comes here in case we wish to make a further issue, or cannot resolve it satisfactorily. Thank you, Mr. Chairman.

The CHAIRMAN. Where is Senator Biden? Does he have more questions? You had better reach him right away, then, because we are ready to move on.

The distinguished Senator from Alabama.

Senator SIMON. Mr. Chairman.

Senator METZENBAUM. May I just make a statement, please. I have a strong interest in what the witnesses are going to say and what the testimony will be, and what my colleagues are saying. They suddenly have brought up the repeal of the Windfall Profit Tax on the floor of the Senate, and I must leave, but it is not for a lack of interest nor courtesy to the Chief Justice.

The CHAIRMAN. Yes. Does the Senator from Alabama have any questions?

Senator HEFLIN. Mr. Chief Justice, we might have a little humor right here. You have been here observing how Senator Simon and I are down at this end, and how several of the Senators are on the other end. The seniority system has it. Now, do you have any views on the equal protection law, as to whether it is a suspect system, or whether this seniority system is a reasonable classification?

Do you have anything that you would like to state about that?

Justice REHNQUIST. Senator, I am not sure I am—I think I might be disqualified to answer, because I have been suffering for 15 years from exactly the same problem. In that period of time I have had the meteroric rise in seniority from ninth to seventh, which is still very junior in our institution.

Senator HEFLIN. No further questions.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Just one question, following along the lines of Senator Metzenbaum's question. I would request a personal, philosophical reflection. Do you believe that moving toward a less segregated society is a worthy goal for government, whether accomplished by the Federal Government, local schools, courts, or other appropriate bodies.

Justice **Rehnquist**. Yes. I do.

Senator **Simon**. Thank you. I have no further questions, Mr. Chairman.

The **Chairman**. We are going to recess for 5 minutes, and send for Senator Biden to see if he has more questions.

We have some other witnesses here, about forty of them we have been holding all day. We are ready to get to them. So we will take a recess for 5 minutes for Senator Biden's man to locate him.

[Recess.]

The **Chairman**. The Committee will come to order.

The distinguished Senator from Delaware.

Senator **Biden**. Thank you, Mr. Chairman, and Mr. Justice, I am not going to be much longer, and I believe I am the last one, and Mr. Justice, you will be able to go get a good dinner, I hope, and as long as we have kept you here, we should be buying, but that may be a conflict of interest. So instead of that, Mr. Karlogis will pay. [Laughter.]

A couple questions. Can you, as succinctly as possible, tell me how you choose the rational basis test over the compelling interest test, as it relates to women?

Justice **Rehnquist**. I think one tries to analyze what the situation of the people are that are making the claim. Whether it is most like the blacks, who are the victims of slavery and discrimination, at the time the 14th amendment was adopted, or, whether they are a group that has a pretty full access to society, no question of right to vote, how big a fraction of society are they—that sort of thing.

Senator **Biden**. Well, in the case you decided, where you changed the standard, where you moved from a rational basis standard to another standard, I believe you said that was the *Mississippi* case, *Mississippi* v. *Hogan*?

Justice **Rehnquist**. I think it was. I am——

Senator **Biden**. I think it was, too. That is my understanding. And it was that you used there the intermediate level of scrutiny on gender discrimination. And so I am clear on the position: that was the one in which Justice O'Connor, writing for the majority, held that a State university nursing school could not be limited to women only, is that correct?

Justice **Rehnquist**. Yes. I believe it is.

Senator **Biden**. And you dissented with Justice Powell, concluding that it was constitutional to discriminate on the basis of gender in nursing school admissions, correct?

Justice **Rehnquist**. I believe that is correct, yes, saying that the nursing school could limit its enrollment to women only under the circumstances of that case.

Senator **Biden**. Have you ever voted to strike down a gender-based classification as unconstitutional under the equal protection clause?

Justice REHNQUIST. I think in Kirchberg against Feenstra if I recall, I think I did, and I think one of the Weinberger cases. There were a number of them. I cannot remember which ones.

Senator BIDEN. Now based on your view, stated view of the equal protection clause of the 14th amendment, would you have voted with the majority to require one man, one vote, or Mr. Justice Harlan who dissented in that case?

Justice REHNQUIST. Senator, this is something like one of the questions that came up with Senator Specter, I think, whether it is one thing as to whether my, the opinions I have written while on the Court subscribe to the view in the one man, one vote case. In Mann against Howell I certainly did subscribe to it.

But to go back to a time when I was not on the Court, and say, as a judge, how would you have voted then, I think perhaps only someone who has been a judge realizes the difference between hearing the holding of a case and saying, "Well, that sounds all right to me," or, no, it does not, and the act of going through, reading the briefs, hearing the arguments, discussing the case in conference. You cannot substitute for that experience.

Senator BIDEN. No, I agree with that, but isn't one man, one vote—you know—Baker versus—isn't that such a fundamental principal that has been established now, that you are not really doing that?

Justice REHNQUIST. If you ask me whether I subscribe to the principle now—as I said, in Mann against Howell, which I wrote for the Court, there is no question that that principle—I thought you meant put yourself back as if you were a Justice——

Senator BIDEN. Well, I did, I did, but——

Justice REHNQUIST. I do not think I can answer that.

Senator BIDEN. In *Katz* v. *The United States,* the Supreme Court held it unconstitutional for the Government to eavesdrop on telephone conversations without a warrant. The decision was based on the fourth amendment.

Rather than ask you would you have voted to require a warrant, can I ask you, have there been cases since you have been on the Court, which in fact you have agreed with the majority on *Katz?*

Justice REHNQUIST. Yes, there have been.

Senator BIDEN. In *Griswold* v. *Connecticut,* the Court held it was unconstitutional for the State to prevent the use of contraceptives, and the basis of the opinion was the constitutional right of privacy reflected implicitly in several constitutional amendments, but not explicitly in the Constitution.

Have you ruled in any cases that would in fact subscribe to that principle?

Justice REHNQUIST. I am not sure that I have because I have had some difficulty with it, and the most recent decision of our Court, in that case, the *Hardwick* case, declined to accept, to extend the principle to the right to practice homosexual sodomy.

There may have been cases in which I have subscribed to that, but I have been somewhat at odds with some of the members of the Court on it, and so I am hesitant to say yes.

Senator BIDEN. Well, as I read that decision, in the *Griswold* case, it seems to me if you had been around at the time of *Griswold* you would have dissented, I suspect, if the reasoning were logical.

But let me suggest that—I am just going to try to clean up some things here.

In retrospect, do you think that the voter watch program that you participated in—I am not suggesting, I am not making a statement as to whether or not you intimidated, or did not intimidate voters. But the voter watch program, back when you were an attorney in Arizona, do you think, in retrospect, that was a good program? Not while you participated.

Justice **Rehnquist**. I think I understand you. I think the voter watch program, as conceived, to have Republican poll watchers in all of the precincts, and to have some sort of a test, according to the statute, as to whether or not they resided where they said they resided, was entirely sensible, and in accordance with law. And I think there is nothing to apologize about it, for at all.

I think the provision allowing challenge for literacy was one that very readily lent itself to abuse, was outlawed in 1964, and I think that one would be better left undone.

Senator **Biden**. Undone. You mean——

Justice **Rehnquist**. I think the challenges for literacy, even though they were authorized by the statute, looking back with the benefit of hindsight, there were abuses on the part of our poll watchers.

Senator **Biden**. There has been discussion here about where other—and I am trying to find it, but yesterday, at some point, you indicated that, I thought, you placed certain people on the spectrum of the Court as being—you referred to several Justices as the centrist Justices.

Where do you sit in that spectrum within the Court?

Justice **Rehnquist**. On the present Court?

Senator **Biden**. Yes. On the present Court.

Justice **Rehnquist**. On the conservative side. [Laughter.]

Using that term for want of a better one.

Senator **Biden**. Do you think you are the most conservative Justice on the Court?

Justice **Rehnquist**. Again, using that term for want of a better one, I think the Chief and I are probably the most conservative, and it may be that I am moreso than he. I am just not sure. This is, I mean, on the basis of our opinions, not on the basis of our——

Senator **Biden**. That is what I am referring to.

Justice **Rehnquist** [continuing]. Personal preferences.

Senator **Biden**. I know in terms of your personal—not in terms of your personal—in terms of your actions, you are a good deal more liberal than—I mean, anybody who would arrange for a cardboard cutout of the Chief Justice is my kind of guy.

Let me ask you—I am trying to sum these up and I only have a few more. Oh. On the two cases, as to make the case that you are open-minded, which was, there was a question about how open-minded you were. You cited two cases where you have changed your view.

Justice **Rehnquist**. Yes.

Senator **Biden**. And now I may be wrong: we went back and looked at the cases, and I must admit, unlike the other ones I have been speaking to, I personally did not read the cases.

But I am told that it is true, you changed your view. You became more restrictive. I may be wrong, and I would like you to speak to it.

United States v. *Scott*. Or *Daniels* v. *Williams*, I believe you suggested was one case, where you had changed you mind, and as evidence that you had an open mind, you were willing to change your point of view. *United States* v. *Scott*. *Daniels* v. *Williams* overrules *Parrott* v. *Taylor*, but only to impose a more restrictive interpretation of the 14th amendment and due—let me say I am reading from a staff memo.

I would like you to comment on it.

Justice REHNQUIST. OK.

Senator BIDEN. Imposed a more restrictive interpretation of the 14th amendment due process clause.

In *Parrott*, the Court had been asked to rule that there could be no deprivation of due process under 28 U.S.C. section 1983, a Federal civil rights statute, unless it could be shown that the defendant acted to deprive rights with more than mere negligence.

The Court declined to adopt the position in *Parrott*, ruling instead, that the proper inquiry for deprivation of due process was whether or not the plaintiff had some other legal process open to him.

In Daniels, however, Justice Rehnquist took the next step, to hold that there can be no deprivation of due process unless the defendant had acted with more than negligence.

This means a person—an example—an incarcerated prisoner, who is deprived of due process through negligence—that is, an inadvertent failure to apprise him of his rights, may be unable to recover for the injury.

Now, is it a proper characterization to suggest that you took a more restrictive view of the due process, and that was the change that you were referring to?

Justice REHNQUIST. That was one of them, yes.

Senator BIDEN. The second one, *United States* v. *Scott* in fact does overrule *States* v. *Jenkins*—still reading from the memo—but only to impose a more restrictive interpretation of the double jeopardy clause of the Constitution.

In *Jenkins*, the Court ruled the double jeopardy clause of the Constitution barred the retrial of a conscientious objector to the draft because jeopardy had attached. That is, as the facts had been presented to the trial court, when the trial court dismissed the case.

In *Scott*, Justice Rehnquist admittedly—they are saying Rehnquist, but you are Mr. Justice Rehnquist to me. In *Scott*, Mr. Justice Rehnquist wrote that the retrial of a defendant was allowed even though his first trial had been dismissed based upon a delay in prosecution.

As Justice Brennan's dissent points out, this decision creates artificial distinctions between when a defendant may be tried a second time.

Justice Rehnquist's only rationale for his change was the experience the Court had with the Government appeals of prosecutions during the interceding 3 years.

Is it correct to say that this was a more restrictive interpretation of——

Justice REHNQUIST. I do not think it is entirely correct to say that in that case. It was two different versions of double jeopardy: one which seemed to make sense at the time it was written, and then, because of other intervening decisions of the Court, it just made a good deal less sense by the time we got to *Scott*.

Senator BIDEN. And really, what we are talking about throughout all of this discussion you and I have had about the 14th amendment are different versions, different versions?

Justice REHNQUIST. Certainly. Not different versions of the amendment but different cases taking different positions, interpreting.

Senator BIDEN. All right. I do have other questions, but I will, in the interest of time, yield, and ask that the questions that I do have, remaining, be submitted to the Justice. There are not very many, Mr. Justice.

They relate primarily to the area that we had discussed before, relating to some of the cert memos you had written, where you had, you know—for example—said that, "I personally don't see why a city can't set aside a park for ball games, picnics, or other group activities without having some outlandish group like the Jehovah Witnesses commandeer the space and force their message on everyone."

I mean, there are questions that I would like to ask relating to those. I will submit those, in writing.

And lastly, Senator Byrd—I am going to ask, which is—you know—as Chief Justice, you will get to assign opinions. As a ranking member you do not have quite as much authority, but if you do it in public it sometimes helps.

I would like to ask my colleague from Illinois, if he will read aloud, on behalf of Senator Byrd, ask aloud the questions that Senator Byrd would like to have asked, because I have got to go for 15 minutes.

Are you going to do that?

Senator SIMON. I am willing to do that.

Senator BIDEN. And they are the only questions, and Senator Byrd specifically asked that the questions be asked and you respond to them at this time rather than submit it in writing.

Mr. Justice, I want to thank you for your patience, and I appreciate the fact that you were cooperative with the chairman's rigorous schedule that he has put forth. Thank you.

Senator SIMON. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Yes, I——

Senator BIDEN. Mr. Chairman, could I ask before the Senator begins, that we have a 1-minute recess here for the four of us to have a brief little, without excusing——

The CHAIRMAN. We will take a recess for a few minutes.

[Short recess.]

The CHAIRMAN. The committee will come to order.

There has been an erroneous report that the committee has agreed that an independent physician will examine Justice Rehnquist in return for a pledge that there will be no health related questions posed to Justice Rehnquist. This is false.

While I understand that Justice Rehnquist is perfectly willing to answer any questions put to him concerning his health, we have nonetheless reached an understanding that Justice Rehnquist's health records are confidential.

Senator Biden and I have agreed to have an independent physician review Justice Rehnquist's medical records and report to the committee on their contents.

Senator BIDEN. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Delaware.

Senator BIDEN. Mr. Chairman, that is correct and the independent physician who will review Justice Rehnquist's medical records will also speak with Justice Rehnquist's doctor and, in fact, report on a confidential basis to the committee.

One more thing if I may, Mr. Chairman, a procedural matter again.

You and I have been up here discussing with our colleagues the order of witnesses. And as I understand it, we will be able to tomorrow morning, by beginning at 8 o'clock instead of later, that we will begin with—who we begin with remains to be seen. But the two panels that are going to take issue with Justice Rehnquist, one a panel, the Civil Rights Panel, panel 4, and panel 6.

The CHAIRMAN. I do not care what panels they are. We have agreed that we will start at 8 o'clock tomorrow, and I fully intended to stop at 1, but we have agreed to go to 2 o'clock tomorrow. And in that 5 hours tomorrow, we will take only 2 hours and give them 4 hours. In other words, give them twice as much time as we have. And we will go tonight until we finish everything tonight except the 6 hours tomorrow.

They can use any witnesses they want to tomorrow during their 4 hours, but we are going to finish at 2 o'clock.

Is that agreed?

Senator BIDEN. That is agreed.

Now, one other thing. I have just been told by staff that Senator Simon should withhold asking those questions because Senator Byrd may physically be on his way over to ask the questions himself. And there is a vote.

We could recess for the vote, Mr. Chairman. We have five bells and we will be right back.

The CHAIRMAN. We will recess for a vote.

[Recess.]

The CHAIRMAN. The committee will come to order.

You can notify the Justice we are ready.

[Pause.]

The CHAIRMAN. The committee will come to order.

The distinguished Senator from West Virginia.

Senator BYRD. Thank you, Mr. Chairman.

Mr. Justice Rehnquist, I apologize for not having had the opportunity to attend the hearings prior to this moment. And I apologize to the chairman and the other members if I am delaying the actions of the committee, but I do not need to explain that I have been very busy elsewhere.

I would like to ask you, Mr. Justice Rehnquist, what would be the single goal which you would most like to accomplish if your nomination to the office of Chief Justice of the United States is confirmed?

Justice REHNQUIST. Senator Byrd, I think the goal would be in the field of judicial administration rather than just the work of the Supreme Court. And it would be to try to persuade Congress and the country that we do need what has been referred to as an intercircuit tribunal, or a National Court of Appeals to operate as kind of a Junior Chamber of the Supreme Court because of the increased caseloads in all the other courts.

I know there have been proposals submitted to the Congress for that. But they have not really gotten the necessary number of votes to be enacted into law. And I would hope by working with the Judiciary Committee in the Senate and the Judiciary Committee in the House, and by doing whatever else I can to assist those committees and getting some support in the ranks of the profession, to get such a court created.

Senator BYRD. Mr. Chairman, has anyone asked this question of the Justice, or has he spoken of it prior to this moment?

The CHAIRMAN. They have asked questions somewhat similar, not exactly.

Senator BYRD. Well, I do not want to go over the same ground if these questions have been asked.

Would you contemplate a court, the members of which would be nominated by the President and confirmed by the Senate as is the case with district courts, appellate courts, and the Supreme Court?

Justice REHNQUIST. Senator, I would. As you know, the bills that are pending do not take that position. I think perhaps with an eye to appeal to the Congress on the ground of economy, they contemplate using existing circuit judges, and simply having a rotating panel that would sit part of the year in Washington to decide those cases.

But there have been very real difficulties raised, I think, with the manner in which judges to that sort of a court would be appointed. And so I think I would favor, if Congress would accept the idea, the idea of a really new court, called it what it is, with new judges to be appointed by the President and confirmed by the Senate.

Senator BYRD. Would you briefly then state what your objection would be to the proposals that would provide for judges being on that court who already serve on circuit courts, and what would be the downside to that, and what would be, as you see it, the advantage of having a new court, an intermediate court, that would be made up of persons nominated by the President and confirmed by the Senate?

Justice REHNQUIST. Let me say first, Senator, that if Congress should feel that the Court could only be created under one of the existing proposals, I would cheerfully abandon what seemed to me some objections to those. But the objections do not come from me; they come from other segments of the profession and other judges.

There are two existing proposals, as you know, for staffing or picking the judges of the new court of appeals under the existing bill. One would be that they be picked by the Chief Justice of the

United States. And I am loath to subscribe to that because I think it would give the Chief Justice too much power over the composition of the court.

Another proposal is that the judges be elected by each of the various circuit counsels and the regional courts of appeals that now sit in the country. I have some reservation about that because, as I answered one earlier question, I believe, I think it would tend to make the new court a little bit like the United Nations with the judges named to it having loyalty primarily to the court of appeals from whence they came rather than to the new court. And that is why I think it should be appointment by the President and confirmation by the Senate.

Senator **Byrd**. Would you see any constitutional question that would trouble you with respect to any approach other than the creation of a court, the members of which are nominated by the President of the United States and confirmed by the Senate of the United States?

These would be officers of the United States, right?

Justice **Rehnquist**. Yes, I suppose they would be.

Senator **Byrd**. And as officers of the United States, why would they not come within the provisions of the Constitution which refer to the nomination by the President and the confirmation by the Senate of members of the Supreme Court, and officers, which term would include the district judges, the appellate judges, and also these judges on this intermediate court?

Justice **Rehnquist**. I think I see your point, Senator. I think that some thought has been given to it, and it was thought, I believe, that there was a precedent for it in the Temporary Emergency Court of Appeals which sat during the Second World War, and which sits now, where the judges held judicial office in a regular court and were appointed to this rather temporary court.

But I realize, as you suggest, that if the court were not temporary, then you would really have a problem under the officers of the U.S. court.

Senator **Byrd**. And I take it that some of the judges who presently sit on the circuit courts throughout the country would be not exactly enthusiastic about the creation of this new court?

Justice **Rehnquist**. They have manifested, the majority of them who have spoken out on it have manifested, I think, disagreement with the idea.

Senator **Byrd**. Well, I am interested in your having indicated that this would be "the goal," as I phrased it. I asked if you could respond to that, and you did. I am, I think, more interested than I have been heretofore in this proposal. And I am anxious to get interested, not only to get what you see as the goal you would most desire to achieve, but also with respect to your viewpoint as to the constitution of that court, and so on.

Well, I will be interested in working with you once you become Chief Justice, if you do become Chief Justice, and I am not passing on that one way or the other right now. But this is a matter which I think will become more intriguing as time goes on and as the necessities grow for some attention to be given thereto.

Let me go now to another line of questions.

Are you familiar with John Ehrlichman's book, "Witness to Power?"

Justice REHNQUIST. I am familiar with it in the sense—was that the first book he wrote?

Senator BYRD. I do not know how many books he wrote. I have in my hand here a book "Witness to Power."

Justice REHNQUIST. I think I am familiar with it. I have not read it from cover to cover. I think I have read parts of it.

Senator BYRD. I shall read from page 136 of that book, and first of all let me read a paragraph in which Mr. Ehrlichman was not too flattering of Senator Robert Byrd of West Virginia. [Laughter.]

> Senator Robert Byrd of West Virginia would be flattered to be considered, Nixon reasoned. There should be some public speculation about Byrd for the Court. He had gone to law school at night and had never practiced law, but it should "get out" that Nixon thought so much of Byrd's ability that he would consider him for the Court. Byrd then would be much easier to work with.

And I do not know why he said that, "He is a very vain man of limited ability." [Laughter.]

Well, I agree with half that sentence. I will leave it to you to guess which half. [Laughter.]

Nixon mused. As I asked questions, it became clear that Nixon had no intention whatever of nominating Byrd. You know, that comes as a great disappointment to me because I always thought he really meant it. [Laughter.]

But he wanted Byrd to hear that his name had been on the President's list—a very short list.

Now, these are the paragraphs which I would call to your attention especially.

> William Rehnquist had been the White House's lawyer from the first days of the Nixon Administration. Deputy Attorney General Richard Kleindienst had recruited him from their home State, Arizona, and designated him to head the Office of Legal Counsel at the Justice Department. When I became Counsel—

This is Ehrlichman speaking—

> When I became Counsel to the President, I was told that William Rehnquist and his staff would be available to brief and answer any of the legal questions that arose in the White House. I was delighted. Bill Rehnquist and I had been law students at Stanford at the same time, and I knew him to have been a superb student. In 1969, when I was Counsel, I sent him more than a few tough questions, mixed issues of law and politics, and he handled them well, with a sensitivity to the President's objectives and to the practicalities of our situation. Bill Rehnquist and I talked often. After I moved to Domestic Affairs, we served on some policy committees together. Occasionally we met socially, at the public school that our children all attended or at some party.

Do you recall your acquaintanceship with Mr. Ehrlichman in a similar fashion to that which he has just recounted here?

Justice REHNQUIST. Yes; I think very much so.

Senator BYRD. Let me read this sentence again:

> When I was Counsel, I sent him more than a few tough questions, mixed issues of law and politics, and he handled them well with a sensitivity to the President's objectives and to the practicalities of our situation.

Do you recall his sending you these "tough questions, mixed issues of law and politics?"

Justice REHNQUIST. I, certainly, recall him sending me some tough questions. This far back in time, it is hard to pick out any one thing.

But the most difficult thing about many of the questions we used to get from the White House in the Office of Legal Counsel was not the inherent difficulty of the question. They were questions that any good lawyer could have answered in 2 weeks or maybe 1 week. But the difficulty was the White House would call at 10 and want an answer at 2 in the afternoon. And that was what posed the difficulty, because the questions often had some substance to them. And it took a real determined effort plus a bit of the seat of the pants instinct to get the work out.

Senator BYRD. Can you recall some of those tough questions which were mixed issues of law and politics?

Justice REHNQUIST. Well, I think the side of the things sent to me was generally the legal side of the thing. The question would have political implications.

Just to take a hypothetical example: Can the President do such and such under such and such?

Now, the question if the President could legally do it, he would go ahead and do it, would be a political question. That was not the kind of thing that was submitted to me.

But a lot of the political decisions that the President was considering had legal implications.

Senator BYRD. These tough questions were mixed issues of law and politics, and you handled them well, with a sensitivity to the president's objectives and to the practicalities of our situation. So, he does say that they were mixed issues of law and politics.

Justice REHNQUIST. I think they were mixed issues of law and politics, but I would be surprised at the White House, with all of the political operatives over there, sending to the Office of Legal Counsel something that they wanted a political decision on.

Senator BYRD. I can understand also, that some of those questions, although they would be mixed questions of law—I can understand that there would be a mix, but with a political, certainly, question implicit, if not explicit.

Justice REHNQUIST. I am sure that was possible.

Senator BYRD. Do you recall some of those questions of that nature?

Justice REHNQUIST. I recall something involving a question where—I think it was a Governor, I cannot think of his name—a Republican Governor who was pressing to have some sort of a—I cannot even remember what it was now, but it was sent over to us with the idea, is what the Governor asking lawful? Could we do it if we wanted to?

But there was never any suggestion that the Office of Legal Counsel simply ought to give a legal opinion because the president wanted to do the thing politically, or because somebody in the White House wanted to do something politically.

Senator BYRD. Mr. Chairman, I should have asked at the beginning: what is the committee's rule with regard to time?

The CHAIRMAN. Well, we have been giving today 10 minutes a round, but I was giving you extra time because you could not be here for——

Senator BYRD. I thank the Chairman.

Now, Mr. Justice, did you render your answers orally, or in writing?

Justice REHNQUIST. Many of them were just over the phone; some of them were formal opinions; some of them may have been letters.

Senator BYRD. Some were in writing?

Justice REHNQUIST. Yes; I think we rendered written opinions over my signature, to departments, and things like that.

Senator BYRD. No; now I am talking about the questions, the kind of mixed questions, the mixed issues of law and political questions that Mr. Ehrlichman is addressing his words to here.

And I believe you indicated you remember receiving some questions from him. Were those responses normally in writing, or were they oral, or——

Justice REHNQUIST. I am sure some of them were in writing and some oral.

Senator BYRD. Let me ask this question: Were there any questions of this nature that you ever refused to answer? Did you ever refuse to answer any of these questions that Mr. Ehrlichman is talking about?

I take it it could have been from Mr. Ehrlichman; it could have been from someone else, Mr. John Dean, or whomever may have been there at the time.

Justice REHNQUIST. I cannot think of any instance, Senator, in which I ever refused to answer a question. I may have said that I could not render a satisfactory opinion in the time given, or, perhaps the opinion I rendered was not the one that the people over there wanted.

I cannot imagine myself flatly refusing to answer a question.

Senator BYRD. Do you recall at any time——

The CHAIRMAN. Senator Byrd, excuse me just a minute. That is the 5 minute bell. If you want to continue, we will just let you continue, or if you want to stop and vote, and come back. What do you prefer to do? I will accommodate you every way I can.

Senator BYRD. Do you suppose you could get them to let this vote run till I get there. Tell them that I have a 100-percent record this year, and a 100 percent last year.

The CHAIRMAN. Ask them to hold it?

Senator BYRD. Yes; if you would, for just a few minutes. I will not be long. If you would.

The CHAIRMAN. Then would you just announce a recess as soon as you finish.

Senator BYRD. That is right, and I think it would accommodate Mr. Justice Rehnquist as well.

[The Chairman leaves to vote.]

Senator BYRD [presiding]. Do you recall, at any time, any question from Mr. Ehrlichman, that you considered to be legally improper for you to answer?

Justice REHNQUIST. No, I do not; Senator.

Senator BYRD. You do not. Do you recall whether any of these so-called tough questions, mixed issues of law and politics, which were handled well, quote, "with a sensitivity to the president's objectives and to the practicalities of our situation," close quote—do you recall any questions that dealt with wiretapping, that came to you from Mr. Ehrlichman, or anyone there?

Justice REHNQUIST. I do not recall any but it has been a while. I would not say there were not any.

Senator **Byrd**. But you cannot say, flatly, that there were none?

Justice **Rehnquist**. No; I cannot.

Senator **Byrd**. Do you recall any questions, "tough questions, mixed issues of law and politics," which you handled well—according to Mr. Ehrlichman—I am just trying to lay it into the context of his statement—"with a sensitivity to the President's objectives and to the practicalities of our situation," close quote, dealing with leaks, investigations?

Justice **Rehnquist**. Not with leaks or investigations. I was chairman of a committee to look into the classification of materials as secret, and that sort of thing. And whether some part of that work might have dealt with leaks, I am just not sure. It was the same general area, certainly.

Senator **Byrd**. Do you recall any questions from Mr. Ehrlichman of the nature which he has described, which dealt with surveillance? Or which dealt with CIA activities?

Justice **Rehnquist**. I cannot recall any, Senator, but I cannot say that there were not any.

Senator **Byrd**. Would questions of that nature, dealing with wiretapping, leaks, investigations, surveillance—would they have come to you in writing, as you recall, or would they have come to you orally? Or do you recall their having come to you one way or the other?

Justice **Rehnquist**. I do not recall their having come to me one way or the other, Senator, but certainly, if they had come, it could have been either oral or written.

Senator **Byrd**. Would questions of that nature have been answered in writing? Questions coming from Mr. Ehrlichman at the White House dealing with any of those sensitive—he spoke of a "sensitivity to the President's objectives and to the practicalities of our situation."

Would questions of the nature of wiretapping, leaks, investigations, surveillance, CIA activities, or any other such sensitive questions—would they have been responded to by you in writing? Or would these have been questions that you would have just picked up the telephone and talked with Mr. Ehrlichman about, or, would he and you have met and discussed them?

Justice **Rehnquist**. It could have happened in any one of those three ways, Senator.

Senator **Byrd**. Do you recall, at any time, any such happening?

Justice **Rehnquist**. I certainly remember meetings to discuss legal questions with Mr. Ehrlichman, and I recall talking to him on the phone, and I am sure I probably sent him letters.

Senator **Byrd**. Where would those letters be, in your judgment, now?

Justice **Rehnquist**. Well, I—excuse me. The original would have been sent to him, and I do not know where that would be, and I presume a copy of the letter would be kept somewhere in the Justice Department files.

Senator **Byrd**. Do you recall anything else—I will not pursue this any further except for this final question. Let me read this one sentence once more.

"In 1969, when I was Counsel, I sent him"—Mr. Ehrlichman is talking and referring to Mr. Rehnquist at this point—"I sent him more than a few tough questions, mixed issues of law and politics, and he handled them well, with a sensitivity to the President's objectives and to the practicalities of our situation."

What does he mean by that, by his reference to "a sensitivity to the President's objectives and to the practicalities of our situation"? I know your answer to that would be, "well, I do not know what he may have meant;" but in the context of this statement—that is, a public statement by Mr. Ehrlichman—what, based on your experience with him, and your working with him, and others at the White House at that time—what was he talking about, in your judgment, Mr. Justice?

Justice REHNQUIST. Obviously, I do not know what he was talking about. I could perhaps give some idea about what I think those words might have meant on this part.

I think it was what any good lawyer does for a client. The client does not want to hear no, no, no. If the client's proposal is, has some legal problem with it, the good lawyer tries to figure out what the client's objective is, and find a lawful way to accomplish the objective. And I think perhaps that is what he is referring to. It was not simply a situation of sending back a letter saying, no, your plan is not authorized under the statute. It would be sending back a hypothetical letter, saying:

> You cannot proceed under the statute as you thought you could, but perhaps if you take a look at another section of the statute and change your plan a little, it might comply with that section of the statute.

Senator BYRD. Well, perhaps I do have one more question.

Is your recollection of the "tough questions" that he writes about here—is your recollection the same as his, that they were mixed issues of law and politics, with a "sensitivity to the President's objectives, and to the practicalities of our situation"?

Surely, if Mr. Ehrlichman is telling the truth there, you would have some recollection, it would seem to me, of what he is talking about, when he refers to the "sensitivity to the President's objectives, and to the practicalities of our situation."

Justice REHNQUIST. Well, those are very general words, Senator. I have offered one explanation of what I thought he might mean by them. I do not know that I can offer much else.

Senator BYRD. Very well. Is there anything else that you would like to say in connection with this language which I have read here this afternoon?

Justice REHNQUIST. Only the qualification, Senator, that I think I mentioned earlier, that I would not have used the term, in describing the things that the White House, in Mr. Ehrlichman's testimony, as mixed questions of law and politics.

I would describe the questions in the White House as that, but it seems to me that it was the legal implications of those questions, and those only, that were sent to us.

Senator BYRD. All right. Mr. Justice, I was told by the chairman to announce that the committee would be in recess pending the call of the Chair, and I take it that this will be later this evening.

Mr. SHORT. Yes, sir. He should return shortly after the vote.

Senator **Byrd**. All right. Very well. The committee will stand in recess, awaiting the call of the Chair, and I thank you. Did Senator Boschwitz have any questions?

Mr. **Short**. No, Senator.

Senator **Byrd**. Very well. Thank you, Mr. Justice.

[Recess.]

[Material referred to follows:]

WITNESS TO POWER, BY JOHN EHRLICHMAN

Senator Robert Byrd of West Virginia would be flattered to be considered, Nixon reasoned. There should be some public speculation about Byrd for the Court. He had gone to law school at night and had never practiced law, but it should "get out" that Nixon thought so much of Byrd's ability that he would consider him for the Court. Byrd then would be much easier to work with. "He's a very vain man, of limited ability," Nixon mused. As I asked questions, it became clear that Nixon had no intention whatever of nominating Byrd, but he wanted Byrd to hear that his name had been on the President's list—a very short list.

William Rehnquist had been the White House's lawyer from the first days of the Nixon Administration. Deputy Attorney General Richard Kleindienst had recruited him from their home state, Arizona, and designated him to head the Office of Legal Counsel at the Justice Department.

When I became Counsel to the President, I was told that William Rehnquist and his staff would be available to brief and answer any of the legal questions that arose in the White House. I was delighted. Bill Rehnquist and I had been law students at Stanford at the same time, and I knew him to have been a superb student. In 1969, when I was Counsel, I sent him more than a few tough questions, mixed issues of law and politics, and he handled them well, with a sensitivity to the President's objectives and to the practicalities of our situation.

Bill Rehnquist and I talked often. After I moved to Domestic Affairs we served on some policy committees together. Occasionally we met socially, at the public school our children all attended or at some party.

The **Chairman**. The committee will come to order.

I believe that completes the questions of the Justice. Are there any more questions by anybody? The distinguished Senator from Nevada. Do you have a statement you want to make, in closing?

Senator **Laxalt**. Nothing formal, but I would like to make an observation or two.

Justice Rehnquist, I think you have done remarkably well during the course of this rather tortuous drill. I do not know of anything that approaches being an inquisition quite like coming before the Judiciary Committee for confirmation purposes. And yet it could have been worse.

In my opinion, you have confirmed everything that most of us on this committee felt—that you are very conscientious, extremely confident, extremely competent.

I think you are coming out of this hearing even stronger than you came in. So, for those of us who have been supporters of yours for a long while, we believe that the President made an excellent choice for an extremely important position. We commend you and wish you well.

Justice **Rehnquist**. Thank you, Senator.

The **Chairman**. The distinguished Senator from Utah.

Senator **Hatch**. Thank you, Mr. Chairman. I will not take long. I would like to paraphrase, and add a little bit to what my distinguished friend and colleague Paul Laxalt just said.

This is a very difficult process. And in your case, it has been made more difficult than it should have been.

But throughout it all, you have demonstrated remarkable restraint, remarkable strength, remarkable stamina. You have shown a great grasp of the law.

You have exemplified judicial restraint, and fine judicial temperament. The ABA gave you the highest rating that it could possible give after reviewing 200 of your decisions and after interviewing sixty five practicing lawyers, 180 Federal and State judges, a number of whom were State supreme court justices; fifty deans and law professors, learned in the law, many of whom probably had differences with you and members of the Supreme Court.

Your own peers that you presently sit with have called you a "splendid choice." I do not know how they could have said it better. After this performance I understand why.

Mrs. Rehnquist, I want to pay my compliments to you. You have sat through this whole hearing with aplomb and beauty and support for your husband. All of us have noticed that. And we really appreciate it.

A great many people in the last couple of days have had a bone to pick with you. But it is exactly your bones that will make you a great Chief Justice. You have demonstrated that you have a funny bone. You have been willing to laugh and get some humor out of it, even though some of it has been poked at yourself. You have a wishbone because you have high dreams, high aspirations and high ambitions for our country.

Last but not least you have a strong backbone. That is a lot more noticeable to some of us who have bad backs, than to others, but that, in the end, is going to get you through this hearing. And, of course, it is going to help you become one of the all-time great Supreme Court Chief Justices.

I want to compliment you and tell you that you have my support. We are very proud to support you, and I think the American people will be very proud to have you as a Chief Justice of the U.S. Supreme Court.

Justice REHNQUIST. Thank you, Senator Hatch.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. I will pass at this time.

The CHAIRMAN. Mr. Justice Rehnquist, I want to commend you for the manner in which you have conducted yourself during this hearing.

We have had, since President Reagan has been in, and I have been chairman of this committee, 285 judges to come before this committee. There has been none that has come before this committee that has impressed me more than you. I say that because your decisions have shown, and your life has shown, that you are a man of integrity. A man who is fair and just. A man of great courage. It takes a lot of courage to dissent as much as you did, and you did what you thought was right. And people would not admire you so much if they did not have that faith in you.

You have shown great capacity, in writing those decisions, decisions that are incise, clear, and to the point. You have shown great professional knowledge in handling the position of Associate Justice.

You have shown judicial temperament, here, on this occasion during the hearing. You have exemplified a high sense of judicial temperament, which is so essential, I think, to a judge.

Then, too, you are an ardent supporter of our constitutional form of government, and you believe the Constitution says what it means and it means what it says. I feel the same way.

You believe in the separation of powers; you believe in the proper division of powers. Certain powers are delegated to the Union; others are reserved to the States. It is important that we remember that reservation to the States, that power is not delegated as part of the Constitution. You have shown that in your decisions, in your public life.

You were well qualified to start with. You served as a law clerk for 1 year; you were in private practice for over 16 years; Assistant Attorney General for 1 year. Then you were nominated to be Associate Justice by President Nixon and you served there 15 years.

I don't know of anyone anywhere that could be better qualified to be Chief Justice of the United States than you. We're proud of you and we're proud of your record. We're proud of what you stand for. I just want to tell you that, in my judgment, you will be confirmed. This committee will vote for you and the Senate will vote for you. You deserve that recognition and you'll get it.

Justice REHNQUIST. Thank you, Mr. Chairman.

Senator HEFLIN. Mr. Chairman, on behalf of the Democratic side here, there could be witnesses that would appear after which Justice Rehnquist himself might like to appear again. I think the reservation should be that, if something arises, Justice Rehnquist himself or the Democrats—or anyone on the other side—could reserve the right for recall.

The CHAIRMAN. Mr. Justice, tomorrow we are hearing some more witnesses. If you want to return after they have testified, we will give you that opportunity. It will be an option that you can exercise yourself.

Justice REHNQUIST. Thank you, Mr. Chairman.

Senator HATCH. Mr. Chairman, if the Justice needs to come back, it should only be on anything that might arise in the future. It should not be on any of the past items we have been over and over again. Let us at least have that understanding.

The CHAIRMAN. You are now excused and we thank you for your presence. We thank you for your testimony, and we wish you well.

Justice REHNQUIST. Thank you, Mr. Chairman.

The CHAIRMAN. We will be in recess for 10 minutes to get the other witnesses.

[The committee was in recess.]

The CHAIRMAN. Mr. Bolton, do you want to make a statement at this time?

STATEMENT OF JOHN R. BOLTON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE

Mr. BOLTON. Yes. Thank you, Mr. Chairman.

I regret that, due to the shortness of time, I do not have prepared remarks, but I do have a few things I would like to say.

Earlier today, reference was made to a memorandum from the President to the heads of executive departments and agencies, dated November 4, 1982. I would just like to begin by reading one sentence from that memorandum. I quote from the President:

> The Supreme Court has held that the executive branch may occasionally find it necessary and proper to preserve the confidentiality of national security secrets, deliberative communications that form a part of the decisionmaking process, for other information important to the discharge of the executive branch's constitutional responsibilities.

Mr. Chairman, there has been a long history in this country, dating back to President Washington, of the importance of preserving the confidentiality of executive branch deliberations. By analogy, the judicial branch of Government preserves the confidentiality of the internal deliberations of our courts; Members of Congress preserve the confidentiality of their communications with their staffs. And, for the same reason, going to the fundamental basis of our Government, the executive branch must also have confidentiality in communication among top advisors to Cabinet heads and to the President.

There is no doubt, Mr. Chairman, of the importance of securing candid advice to ensure the proper functioning of the executive branch. If I could, to demonstrate the importance of this, I would like to read brief excerpts from two Supreme Court opinions. The first is the opinion of the Court in *Nixon* v. *Administrator of General Services.* I might say that the language I am quoting from is from Justice Brennan. I quote Justice Brennan who, in turn, quotes from the Solicitor General.

Justice Brennan said, "Nevertheless, we think that the Solicitor General states the sounder view and we adopt it." Justice Brennan quoting now from the Solicitor General: "This Court held in *United States* v. *Nixon* that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of fact and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure. The privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore, the privilege survives the individual President's tenure.

Now, the reasons for the privilege, the Court said in United States against Nixon, are plain—and I quote now from the opinion in that case.

"Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interest, to the detriment of the decisionmaking process."

Let me quote further from that opinion, if I may, Mr. Chairman. "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions, and to do so in a way many would be unwilling to express except privately."

Mr. Chairman, executive privilege is claimed only after the most searching scrutiny. Not all documents qualify and, indeed, as I mentioned earlier today in response to the request from three Democratic Senators, certain documents were produced to the committee from the Office of Legal Counsel, that in our legal judgment would not qualify.

However, following the procedures laid out in the President's memorandum, from which I have quoted previously, I have been advised by the counsel to the President, Peter Wallison, on the advice of the Attorney General, the Assistant Attorney General for the Office of Legal counsel, and the Counsel to the President, that the President has authorized me to assert executive privilege with respect to the confidential memoranda, opinions, and other deliberative materials from the files of the Office of Legal Counsel from 1969 to 1971.

That concludes my remarks, Mr. Chairman.

The CHAIRMAN. That's it. Thank you very much.

Senator HEFLIN. Mr. Chairman.

The CHAIRMAN. Any questions?

Senator HEFLIN. Yes, Mr. Chairman. I think this witness is subject to being examined. In the normal course of events, I'm not sure how an executive privilege is entered, as to whether or not it is entered by an emissary like Mr. Bolton or, on the other hand, whether it comes throuqh a written document or how.

I am not conversant with all of this information, as are several others, such as Senator Biden, the minority leader. Rather than delay it right now, I would suggest that we go to other witnesses and that Mr. Bolton be reserved. I understand that Senator Biden is on his way here, and when he arrives, if he has questions that he wishes to direct to Mr. Bolton, he would have that right. I think the courtesy is his and it is his right.

I would think, therefore, rather than delay, that we could go to some of the other witnesses and reserve Mr. Bolton's cross-examination until Senator Biden arrives. As I understand it, he is on his way.

Senator SIMON. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. I am obtaining materials, from the House Judiciary Committee, which contain many internal documents of the kind we're talking about, and not from an administration of some years ago but from the current administration. I had just a few of those reproduced here.

Here is a memo from Laurel Pike Melson, attorney-advisor; she is with the Office of Legal Counsel, and it's to Theodore P. Olson, Assistant Attorney General in the Office of Legal Counsel. It's dated December 6, 1982.

Here is another memorandum to Theodore Olson, within the Department. Here is a memorandum for the Attorney General from the Legal Counsel, dated May 30, 1984. Here is a memorandum from Legal Counsel to the Assistant Attorney General for Legislative Affairs.

There are half-a-dozen more here that I have had my staff xerox. It is fairly clear that executive privilege and a willingness to turn over documents has been part of the history of this administration and is in line with the President's memorandum of November 4, 1982.

In that memorandum, incidentally, the President says "Executive privilege will be asserted only in the most compelling circumstances."

I don't know that we have such compelling circumstances right now, and clearly, what we are being told is appreciably different from the earlier pattern of this administration. I would hope that Mr. Bolton would take this message back to the Attorney General. If some of the documents really are, for some reason, very sensitive, that would be a good reason to use executive privilege. But it just sounds like we're being denied material that we ought to have. I hope that Mr. Bolton and the Justice Department will reconsider.

Mr. BOLTON. Mr. Chairman, might I respond to the Senator's remarks?

The CHAIRMAN. Yes, you may respond.

Mr. BOLTON. Senator Simon, I'm somewhat constrained because of the possibility of litigation still involving the documents to which you referred. But I can say that there is one clear distinction between the case to which you're referring and the present case, and that is that in that matter the President determined to waive executive privilege; in this instance he has determined to assert it.

Senator SIMON. I understand that the President is asserting it here. I guess I would urge you to think that over carefully. I would like to know a good, solid reason why in this instance executive privilege is being asserted.

Mr. BOLTON. Senator, as I testified earlier today, and as I tried to indicate in my remarks this evening, the nature of the Office of Legal Counsel in the Department of Justice, together with the Office of the Solicitor General of the Department of Justice, is really unique within the executive branch and our system of justice.

Because of the critical legal advisory role that those offices play for the Attorney General, the President's principal legal advisor, and the importance and the complexity and the sensitivity of the issues with which they deal, to open the files of those offices and reveal the documents, even under guarded circumstances, would gravely risk impairing and perhaps destroying the ability of those offices to provide the critical legal advice that the President and the Attorney General require to fulfill their constitutional mandate, to take care that the laws be faithfully executed.

Senator SIMON. We are not talking about today—and these documents, a whole host of them, are from this administration. We are talking about a decade-and-a-half ago.

If nothing else, can you provide an index or a list of the items you're withholding?

Mr. BOLTON. Senator, at this point, I would have to say that I believe the answer to that is "no", but I will certainly take that question under advisement.

The CHAIRMAN. I would like to say that in the President's order of November 4, 1982, certain procedures were outlined there. It provides that congressional requests for information shall be complied with, unless—and this is important—unless it is determined that compliance raises a substantial question of executive privilege.

A substantial question of executive privilege exists if disclosure of the information requested might significantly impair the national security—that's not the case here, but the next two are important—the deliberative processes of the executive branch, or other aspects of the performance of the executive branch's constitutional duties.

So, even if executive privilege was not claimed here, I feel that under the President's order here that the ruling as previously made was correct. But executive privilege has been claimed here and, so far as I'm concerned, that ends it.

If you wish to furnish other information or requests, we'll be glad for you to do it.

Mr. BOLTON. Mr. Chairman, if I could just make the record clear, parts or all of the documents in question fall under all three heads of the sentence which you read, and which I read earlier.

The CHAIRMAN. Are there any further comments?

The distinguished Senator from Massachusetts.

Senator KENNEDY. Mr. Chairman, I don't think one can reach any other opinion but that the administration is stonewalling on this.

Mr. BOLTON. Excuse me, Senator——

Senator KENNEDY. You'll have an opportunity to respond.

The administration is stonewalling on these requests. During the course of these hearings we have made requests with regard to memoranda on civil rights and civil liberties. I was on this panel at another time when we had this nominee for Justice on the Supreme Court. We were unable to get information at that time, and after the hearings were closed, we found out the allegations of intimidation of blacks and Hispanic voters down in the Southwest and we had to go back over that now many years later to get the direct response from the individuals who have, in many instances, sworn affidavits stating that this was the case.

We had difficulty in getting information back the last time, and then during the course of the deliberations of the Senate we find the memoranda allegedly written by Mr. Rehnquist, that indicated full support for *Plessy* v. *Ferguson,* that Mr. Rehnquist in testifying here says was to be presented for Mr. Robert Jackson, a distinguished jurist, whose closest confidants and people that know him consider it a sham and a disgrace.

We didn't have an opportunity at that last hearing to get information on this. We had to inquire some years later. Then, we hear Mr. Rehnquist say "Well, that's many years ago. I can't answer."

This is on the eve of Watergate, these activities. I was on this committee when Sam Ervin conducted the hearing about illegal wiretapping, where press men and women were being wiretapped in this country; loyal American citizens were being wiretapped. I was on this committee when we took remedial action with legislation to deal with that issue. I was on this committee when we were having mass demonstrations and we had proposals by the administration about mass arrests, involving first amendment rights, the right of petitioning their government, the right of free speech, the right of dissent.

There have been allegations and charges that Mr. Rehnquist was providing the legal guidance and advice on issues that affected the first amendment, basic rights and liberties of individuals. That's an issue before our panel. It doesn't involve the security of the United States; it involves the security of the rights of the first amendment to the American people, and the most important right is the first amendment to the Constitution. That's what we're talking about.

This is the eve of Watergate, where we have the various plans and programs that provided the "plumber" plan that this committee was familiar with, the Houston plan, about how they were going to subvert individual rights and liberties, when we were having the CIA spying on American citizens.

I think we do a disservice to Mr. Rehnquist if he wrote a memorandum saying the first amendment rights were involved with these individuals, and the members of the administration ought to be restrained and respect those rights, and we don't see it. I think that would be enormously valuable.

There is only one other conclusion you could reach, and that is that kind of protection was not evident in the kind of memoranda that Mr. Rehnquist wrote.

In *Laird* v. *Tatum,* involved the use of military personnel to provide surveillance. To read Mr. Rehnquist's exchange with Sam Ervin on that, talking about whether there was a justiciable issue or not and indicating there wasn't, and then casually referring to that exchange in his memorandum opinion as a discussion of Constitutional law, when he issued his decision on that case, the effect of which was to deny discovery opportunities on governmental activities about which he was allegedly involved in advising the Justice Department.

I daresay, if we got discovery during that period of time, we may not have had a Watergate. We may not have had a Watergate, because those activities were being undertaken during that period of time.

So, it begins to tie up, Mr. Rehnquist. He indicated that he didn't think those individuals, those protesters, had a right, and then when he got to Court, which at the time this case was coming to Court, he cast the deciding vote. That delayed the opportunity for a full examination of the activities of the administration during that period of time. He was legal counsel guiding the Attorney General on first amendment rights, civil rights and civil liberties, what had to be respected and what didn't. It's all becoming very clear now.

I daresay, if you can find the justification under national security, under President Reaqan's guidelines to withhold these documents you're a much better lawyer than anyone that I can possibly imagine.

I would just conclude with this, Mr. Chairman. Under President Reagan's order, congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises substantial questions of executive privilege. A substantial question of executive privilege exists if disclosure of the information requested might significantly impair the national security. That's the first line, national security, including the conduct of foreign relations. The deliberative branch of the executive branch, or other aspects of performance.

Mr. **Bolton.** Mr. Chairman, could I respond to Senator Kennedy?

The **Chairman.** Yes; you may respond.

Mr. **BOLTON**. Very briefly, Mr. Chairman.

Senator Kennedy, you correctly stated that you were a member of the committee in 1971 when Justice Rehnquist was the nominee to be Associate Justice, and came before the Senate.

Our records indicate that, in 1971, no requests were made for any documents from the Office of Legal Counsel.

Senator **KENNEDY**. That's not the question. We asked for additional kinds of information, which this committee was not permitted to have until after the Committee had finished with the witness and had no opportunity to examine further.

What we are basically talking about is information. We are talking about information, and you've got it and you're not giving it.

Mr. **BOLTON**. Mr. Chairman——

Senator **KENNEDY**. That's the question. You've got it and you're not giving it, and it's involved with the questions that I asked about civil rights, with respect to civil rights and civil liberties, at a time when those fundamental values were probably as threatened in our society as at any time in recent history. Mr. Rehnquist wrote memoranda concerning these issues.

I think the American people, in whatever concerns they might have, would feel an enormous sense of relief to know that he was in the vanguard for protecting those rights and liberties. I think they're entitled to that kind of assurance.

But your response is "Oh, no, no, no, no, no, no. We won't be able to get qualified people that will ever come down and work in our office again because someone might release a memo." That is hogwash. That's hogwash. And President Reagan must understand it with his document on it.

Mr. **BOLTON**. Mr. Chairman, may I respond to that, too, please?

The **CHAIRMAN**. Yes; you may respond.

Mr. **BOLTON**. Let me say first, Senator Kennedy, that the subject matter of any of the documents that are withheld is not the reason for the withholding. The reason for the withholding is a principle, in my view, at least as important as the first amendment that you mentioned. That principle is the separation of powers. It is critical to the survival of the constitutional system that the Framers created that the branches operate with sufficient independence that they can fulfill their constitutional responsibilities.

Just as the Congress has constitutional responsibilities, just as the Judiciary has constitutional responsibilities, so too does the executive branch. I quoted from a Supreme Court opinion before you arrived which recognized the critical importance of candor, and of the need for an executive privilege.

Senator **KENNEDY**. Finally, in response to your earlier comment about information not being provided by the Office of Legal Counsel, Mr. Rehnquist was queried by Senator Bayh on just about all of these areas. His answer at that time was attorney-client relationship. But he didn't indicate that he was bothered by it, but when the time came again, when we asked the Justice Department to waive that particular issue, the answer was no. So, we were denied it then and we found the information that came out afterward.

We're being denied it tonight. And it isn't the committee. It's the American people. You're not saying it to Senator Thurmond, you're not saying it to me, not saying it to any of these Members. You're telling the American people that at the time of greatest threat of individual rights and liberties and the civil rights of the American people, he wrote about these matters and expressed his view on those different questions, umpteen years ago, that they have no right to have the opportunity to view those materials—not national security, not dealing with nuclear weapons, not dealing with submarine capability. We're talking about questions of mass arrests; we're talking about surveillance of American citizens; we're talking about wiretapping; we're talking about rights of privacy; we're talking about the civil liberties of the American people.

And your answer is "no way" to the Judiciary Committee, "no way" to the American people. That's your answer.

Mr. Bolton. With all due respect, Senator Kennedy, I don't think that's my answer. My answer is that the separation of powers——

Senator Kennedy. Provide the information, then.

Mr. Bolton [continuing]. On which the American people rely for the proper functioning of their Government dictates this result.

I might say, also, that the questions that were put to the Justice before he was excused were not questions that went to the substance of the deliberations; as has been held in any number of court cases concerning the attorney-client privilege, it is permissible to ascertain whether the communication was made, but it is not permissible to ascertain the substance of the communication.

The Chairman. The distinguished Senator from Utah.

Senator Hatch. Mr. Chairman, this has gone on more than enough. If you stop and look at it, the fact of the matter is you are not talking about the whole Department of Justice. You're talking about the Office of Legal Counsel.

In spite of all the bald assertions that Senator Kennedy has made here tonight about all of this stuff that you would find if you could get into these records, the fact of the matter is that he doesn't know what you would find. That is what you call a fishing expedition. Almost any court of law would be concerned about fishing expeditions under almost any set of circumstances.

The reason there is a desire to have a fishing expedition—and I think it is exemplified every time somebody on the other side gets excited about an issue like this—is that it is a Watergate issue. Let us be honest about it. The reason they are so excited about fishing here is because they really do not have anything to stop this nominee. And they have not been able to show anything to stop this nominee. And their assertions that he is an extremist have not been proven thus far, nor will they be proven. In fact, if anything, their assertions are extreme. That has been proven by the Justice who has sat here and tolerated the kind of abuse that he has taken from time to time.

It doesn't take any intelligence to understand that when you are talking about the Office of Legal Counsel, you are talking about the personal law firm of the President. You are talking about people who have to give very considered legal recommendations on all kinds of issues that involve confidential informants, national security issues, and all kinds of issues that require confidentiality.

Furthermore, your position on the separation of powers, being an important part of the Constitution is well taken. I have to agree with you, especially when the President asserts executive privilege, another right he has under the Constitution.

But you are right, Mr. Bolton. The separation of powers doctrine is an important doctrine. You cannot be bullied by political talk here from the Judiciary Committee, no matter how important the Senator may be, no matter what bald assertions he makes, no matter how long he has been here, and no matter how much they forgot to ask for these materials back in 1971.

But now they want them, after the man has served 15 solid years on the Supreme Court. Two hundred opinions have been gone through by the Bar Association. Sixty-five practicing lawyers, 180 judges, including State Supreme Court Justices from the various States, and 50 law deans and professors were interviewed. We have questioned the nominee for almost 3 days now. And we are going to hear from the other side on the ballot issue. We have FBI reports. We have a wealth of documents coming out of our ears. We have articles, we have memoranda. We are going to listen, I suppose, to more than 60 witnesses, an additional 10 that the other side has demanded. And now they are coming in here and asserting Watergate.

Let us be honest about it. Some of the best and some of the worst "fishermen" in the world are on this committee. You make the choice which ones are the worst.

Senator SIMON. Would my colleague yield?

Senator HATCH. Yes; I would be happy to yield. I think he has made a set of very good constitutional points. I believe that it is time for us to realize that there may be some merit in what he is saying.

Senator SIMON. On the question of separation of powers, here I have four documents, rather substantial books, which contain all kinds of memoranda between people within the Department of Justice——

Senator HATCH. And given to other agencies.

Senator SIMON [continuing]. Legislative Counsel to the President and so forth, of this administration.

Senator HATCH. That is right.

Senator SIMON. And they turned those over to the House Judiciary Committee. Now we're asking for documents of 15, 16, 17 years ago, and all of a sudden there is a separation of powers problem.

Senator HATCH. Only because the President did not assert executive privilege. Had he asserted it, they would not have given those documents. Now, let us be honest about it. He is asserting it here. He has a right to and every reason to.

You are not talking about anybody. You are talking about a sitting Supreme Court Justice. You do not have to treat him like a tin can you can kick all over the street.

Senator SIMON. We're not talking——

Senator HATCH. We're not talking about you, Senator Simon. I do not think you are.

Senator SIMON. You were here when Justice Rehnquist said he had no objection to us receiving these documents.

Senator **HATCH**. He is not the one that determines that. He is not the President of the United States.

The **CHAIRMAN**. But the Attorney General didn't as a matter of principle.

Senator **HATCH**. That is right. He stated the principle.

Senator **SIMON**. A principle selectively applied.

Senator **BIDEN**. Would the gentleman yield?

Senator **HATCH**. That is a right the President has under the Constitution.

Senator **BIDEN**. Sure he does. But the Office of—the opinion of the Office of Legal Counsel are, in fact, released——

Mr. **BOLTON**. Certain opinions are released.

Senator **BIDEN**. Certain opinions are released, that's right, and you make the judgment opinions, right? As to whether or not they, in fact—for example, the fellow or woman who wrote the opinion, the memorandum opinion for Assistant Attorney General in the Criminal Division of Immigration and National Security, eluding inspection is a criminal offense is in venue, that person, the mere fact that that memo, which was written for the Attorney General, and he or she did not know it was going to be released, the fact that it's now released—it was John M. Harmon, Assistant Attorney General, Office of Legal Counsel—that's not likely to keep him from working for the office that you, without consulting him, released the memo, is it?

Mr. **BOLTON**. Quite the contrary, Senator. There are certain memoranda prepared by the Office of Legal Counsel with the full intention that they be published in books such as——

Senator **BIDEN**. Yeah; but all of them, every one in here?

Mr. **BOLTON**. No; that's exactly the point.

Senator **BIDEN**. So, what you do, you go through and you make a judgment based upon what can be released and can't be released, or should not be released, right?

Mr. **BOLTON**. No, sir; there are certain documents, as I mentioned earlier today, that are prepared by the Office of Legal Counsel and in some cases signed by the Attorney General and in some cases signed by the Assistant Attorney General for that office, that are intended as guidance for all or other parts of the executive branch, and for the public at large.

Senator **BIDEN**. Are they the only ones that are released?

Mr. **BOLTON**. They are the only ones published in volumes such as the one you're holding.

Senator **BIDEN**. They're the only ones published?

Mr. **BOLTON**. That's correct.

Senator **BIDEN**. So, there is no guidance for the Attorney General coming from Mr. Rehnquist at the time that all these phenomenal things were going on that Senator Kennedy spoke to that wouldn't, in fact, warrant being seen now? I mean, is it going to keep somebody from not working for the government because they're released now?

Mr. **BOLTON**. I believe, as I quoted from Justice Brennan's opinion a little bit earlier—and perhaps I could quote from it again since you arrived after that.

Senator **BIDEN**. Sure.

Mr. **Bolton**. This is Justice Brennan, quoting and adopting the views of the Solicitor General in the case of *Nixon* v. *Administrator of General Services:*

> The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure. The privilege is not for the benefit of the President but for the benefit of the Republic. Therefore, the privilege survives the individual President's tenure.

Senator **Biden**. I don't disagree with that. All I'm trying to figure out here is this. It seems to me we could settle this real easily. Why don't you all go down, make up a list of all the memoranda that are involved. Go down and look at the memoranda. If you conclude that each memorandum would, in fact, if released, do what Justice Brennan is worried about, then tell us. If not, if they're like many of these memoranda that are in here which, in fact, are pretty straightforward, and would not only be something bad to be released—for example, you already sent us one. You sent a memorandum that, ironically, was written by Justice Rehnquist to the President defining the executive privilege. You sent us that one up.

Mr. **Bolton**. That legal advice had already been made public, as I understand it.

Senator **Biden**. Oh, that's the reason. I got it.

So, that whoever made it public before—I mean, why can't you use the same test that was used before? I mean, can't you just go through them and figure out whether or not they really are—I mean, why are you doing this so that now you're going to have people saying "well, I don't know if I can vote this . . ." Why can't we just go in the back room—I'm serious; I'm not being smart—sit down and go through them.

Senator Hatch and I could sit down with you, and you say: "Look, I can't show you this one; I can show you this one. I can't show you this one, but I can show you this one." That's what we have always done before. But you're making this blanket exception.

Mr. **Bolton**. Senator, each of the documents that was produced or withheld was subject to exactly the kind of consideration that you've just asked for.

Senator **Biden**. You went through every document?

Mr. **Bolton**. I didn't personally. They were gone through by attorneys within the Department of Justice.

Senator **Biden**. I see. And every single thing that William Rehnquist wrote at that time falls into this category?

Mr. **Bolton**. No; all of those things that were responsive to the request in the letter of July 24th——

Senator **Biden**. Everything that had to do with civil rights, every memorandum he ever wrote on civil rights——

The **Chairman**. Senator, we've got to get on with it.

Senator **Biden**. I know we do.

The **Chairman**. We've got 40-odd witnesses here. Let's get through with this thing.

Senator **Biden**. Can you tell us how many there were? You know, you acknowledged it's OK to ask for—that the separation of powers, in fact, when you cited the analogy of the attorney-client privilege, you said you can have permission to ask if communications were made but not what the communication was.

Can we ask you how many communications were made?

Mr. **Bolton**. Senator Simon made a similar request before. I told him my view at this point was that the tentative answer to that would be "no," but we would take that under advisement.

Senator **Biden**. I just think you all are making a big mistake, I really do.

Mr. **Bolton**. Senator, could I respond to that, because——

Senator **Hatch**. Mr. Chairman, may I ask a question?

The **Chairman**. Yes.

Senator **Hatch**. Let me ask you one question.

Has this committee ever received any documents upon request from the Office of Legal Counsel of this nature before?

Mr. **Bolton**. To my knowledge, Senator Hatch, this committee has never received any internal deliberative OLC memoranda before.

Senator **Biden**. Have we ever asked for any?

Senator **Hatch**. Excuse me——

Mr. **Bolton**. The committee did not for certain on Justice Rehnquist's first confirmation hearing in 1971, and not that I know of before.

Senator **Biden**. We're asking now.

Senator **Hatch**. Let me finish, if I could.

Mr. Bolton, as I understand it, throughout the history of the committee we have asked for various documents and we have received documents from other parts of the Justice Department, but we have really either never asked for them or we certainly haven't ever gotten them from the Office of Legal Counsel?

Mr. **Bolton**. I believe that's correct.

Senator **Hatch**. And that is why you are taking this principle position?

The **Chairman**. Let's move on. The decision has been made. If you wish to take it up, let us know tomorrow. We're going to move on with these witnesses now.

Senator **Metzenbaum**. Mr. Chairman, I haven't had an opportunity to be heard, and I came over especially. I left the floor because I was very disturbed, because to me, the whole issue concerning Justice Rehnquist has become one of credibility and integrity, and he's not a party to this particular decision.

Mr. **Bolton**. That's correct.

Senator **Metzenbaum**. I do not lay this on him, but the fact is, what we have now is a deliberate coverup. Simply stated, it's a coverup. You, Mr. Bolton, may try to give it a higher profile, that it has to do with the separation of powers, but that just doesn't fly. Because the President of the United States specifically said that Congress could have the information.

You came here this morning saying we couldn't have the information. And then somebody said to you, that's not true unless you invoke executive privilege. So, you ran back to the office. Somebody decided to invoke executive privilege. That didn't make it right, because we're entitled to know what the facts are.

Now, let me ask you, Mr. Bolton, who decided to submit this matter to the President?

Mr. Bolton. It was the recommendation of Mr. Cooper, myself, the Attorney General, and the Counsel to the President.

Senator Metzenbaum. Then it was all of you, a group of you, that made the recommendation; is that right?

Mr. Bolton. You could call it that.

Senator Metzenbaum. But it included the Attorney General?

Mr. Bolton. I wouldn't put myself on the same plane with the Attorney General. I was——

Senator Metzenbaum. I'm not concerned about that. But it included the Attorney General?

Mr. Bolton. That's correct.

Senator Metzenbaum. Now, what I don't understand ties in with things that my colleagues have said, and that is, what is so secret? Why are you unwilling to make this information available? If there were an issue of separation of powers, then the President wouldn't have issued his memorandum of November 4, 1982, which spelled out a procedure and said: "Give the information to Congress."

What is there in these documents that you don't want us to——

The Chairman. He said "unless," and then he set out——

Senator Metzenbaum. That's right. But none of those three things are covered.

The Chairman. Oh, yes.

Senator Metzenbaum. Mr. Chairman, I didn't interrupt you. If you please, if you please, I didn't interrupt you.

The Chairman. Go ahead.

Senator Metzenbaum. All right. Thank you.

There is certainly no national security issue. There is certainly nothing about the deliberative processes of the executive branch, because this is a matter of 15 years ago. I can't have anything to do about those deliberative processes, or other aspects of the performance of the executive branch's constitutional duties. I see no way that those can be involved.

So then you drop down in this particular memorandum to the point of the Department having the right to ask the President to do it, and the President invokes executive privilege. Nobody denies the fact he has the right to do it—I don't deny the fact; others on the committee may. But he has the right to do it.

But I question the judgment, I question the propriety of doing it. I question whether it should be done when we have before us the confirmation of a Chief Justice who himself says let the information be made available. "I don't object to it."

Mr. Chairman, I believe that what you have here is a situation where you have drawn a blanket over a part of the Chief Justice's background, in a period of time that was extremely important, as spelled out by Senator Kennedy. What concerns me is why he would do this. What logical reason?

Separation of powers does not fly, Mr. Bolton. You can hang it on that, but it does not fly, since the President's memorandum very carefully takes care of that.

The Chairman. Where is this?

Senator Metzenbaum. Where is what?

Mr. Bolton. Mr. Chairman, could I respond, if Senator Metzenbaum has concluded? Could I respond?

The Chairman. Yes, you may respond.

Mr. Bolton. The claim of executive privilege here is based on all three of the heads that are listed in the sentence from the President's memorandum that you referred to.

And I would say in response to your comments, and to a remark that Senator Biden made, that "a lot of people may not understand this." A lot of people may not understand it, and I wish that the appreciation of the importance of separation of powers and the proper role of the three branches was more generally known.

Senator **Metzenbaum.** But it is not separation of powers.

Mr. Bolton. It is, Senator, with all due respect.

Senator **Metzenbaum.** Because the President has specifically said we may have the information unless you invoke executive privilege and you people told him to invoke it. So, there was no separation of powers issue until you told him to invoke it.

Mr. Bolton. I do not quite follow that, Senator.

The **Chairman.** Go ahead. You have a right to finish your statement.

Senator **Metzenbaum.** But I do. I do follow it.

The **Chairman.** Finish your statement.

Mr. Bolton. The President has made a determination, based on the recommendations that I noted before, that release of these documents would impair the internal deliberative functions of the Government.

And even though it was some time ago, as I quoted earlier from Justice Brennan, not known as an extreme conservative, and his adoption of the Solicitor General's brief in Nixon against Administrator of General Services, the privilege survives the tenure of any one President because—and I will quote again: "The privilege is not for the benefit of the President as an individual, but for the benefit of the Republic."

Senator **Metzenbaum.** Mr. Bolton, did you give us the memos, the private memos of Brad Reynolds when he was up for confirmation?

Mr. Bolton. I was not at the Department at that time. My understanding is that memoranda from the files of the Civil Rights Division were provided to the committee. But I would stress that there is a difference between the work of the litigating divisions of the Department—although in some cases, a claim of executive privilege would be appropriate there—and the Office of Legal Counsel and the Solicitor General's Office which perform core functions of advising the Attorney General, the President's chief legal advisor.

And I might note that, as I understand it, during the confirmation hearings of Charles Freed to be Solicitor General, the committee requested documents from the Office of the Solicitor General, and the request was declined.

Senator **Metzenbaum.** Mr. Bolton, did you give Office of Legal Counsel memos to the House?

Mr. Bolton. As I indicated earlier to Senator Simon who asked a similar question, and let me repeat what I said there, because there is still the potential for litigation arising out of that matter, I am constrained in what I can say.

But one critical difference between that situation and the present situation is——

Senator **Metzenbaum**. Well, just answer yes or no. Did you or didn't you?

Mr. **Bolton** [continuing]. Is that in that situation, the President determined to waive executive privilege. Here, he has determined to assert it.

Senator **Metzenbaum**. But you did give the memos to the House?

Mr. **Bolton**. Such documents were produced. That is correct.

The **Chairman**. Anything else now? We have got to get onto these witnesses. I want to say this: this is not the first time executive privilege has been claimed. In 1961 and 1962, I spearheaded an investigation concerning the merging of the military.

I requested memorandums and documents, and everything from the Defense Department, from Secretary McNamara. He would not furnish them. And finally we kept on and on, and then the vice president was sent down to the hearing to announce that he claims executive privilege.

This is no more of a Watergate or a coverup than I caught back during the Kennedy administration. They denied me the documents I wanted at that time. They claimed they had the reason for it, national security, and so forth. Anyway, that was it.

So this situation today is no worse than it was then. They have a right to exercise executive privilege, and I did not contend further because I knew they had that right.

Now you have exercised executive privilege here on behalf of the Attorney General and the President, and that ends it. If you want to furnish anything else tomorrow or later, you can do it, but so far as I am concerned, that ends it, and we are now going into the witnesses, and you are now excused.

Senator **Kennedy**. If the Chair would—since there was some reference to a previous administration, if I could just have maybe one minute on that.

The **Chairman**. I will be glad to——

Senator **Kennedy**. If it was wrong then, it does not make it right now. There were wrong things that—mistakes made during that time, and it does not make them right now.

Now I understand, that under the Executive order, to comply with it, the document has to be referenced, the date has to be referenced. The author has to be referenced and the recipient has to be referenced, in order to comply with the law. And——

The **Chairman**. I thought I should have had them then, but under the authority now——

Senator **Kennedy**. Well, I am just asking whether that has been complied with now, from the Office of Legal Counsel.

The **Chairman**. But I think——

Senator **Kennedy**. Those are the requirements under law now——

The **Chairman**. I think they have got grounds here to claim——

Senator **Kennedy** [continuing]. And I want to know if those have been complied with.

The **Chairman** [continuing]. If they want to. In fact——

Senator **Kennedy**. I am asking a question. Can I get the answer?

The **Chairman**. In fact we could even——

Senator **Kennedy**. You can give me the answer. Otherwise we will sing a song here——

The **Chairman**. Do you want to answer his question?

Senator **Kennedy**. I do not think there have been, and that is why we are getting a little committee filibuster.

Senator **Hatch**. Look at that smile on Senator Kennedy's face.

The **Chairman**. Well, at any rate, even if he had not claimed executive privilege, I think the committee had the right to act on the second and third reasons here, to waive exceptions.

Senator **Kennedy**. Well, have they got the document date, author and recipient? Have you complied with that part of the law?

Mr. **Bolton**. Excuse me, Senator Kennedy. From what portion of the memorandum?

Senator **Kennedy**. To use the executive privilege, under existing judicial precedents, you have to name the document, the date, the author, and the recipient. Those are required now under the current judicial holdings for the exercise of executive privilege, and I am asking whether that aspect of the law has been complied with by the administration.

Mr. **Bolton**. Well, I believe what you are referring to is if there is anything further to be done with it. There is certainly no requirement, at this juncture, that such a tabulation be prepared.

Senator **Kennedy**. I believe once, if you are going to use executive privilege for any particular document, those requirements have to be met. So I would hope that you would, because there is going to be obvious efforts to obtain them.

Mr. **Bolton**. I would say again, Senator, I do not believe there is any specific requirement at this point.

The **Chairman**. In 1961, they were not referenced then. The military was muzzled. They could not talk against communism, make public speeches, and I objected to it because they were muzzled. I tried to get some documents and they——

Senator **Kennedy**. I thought we were going onto the other witnesses.

The **Chairman**. Let me get through. And no numbers were given. No numbers were given, no reference was given——

Senator **Kennedy**. That is a long time ago.

The **Chairman**. And I was just in a—that is right, a long time ago.

Senator **Kennedy**. That is a long time ago.

Mr. **Bolton**. I am with you, Mr. Chairman.

The **Chairman**. At any rate, this situation here is not half as bad as that. Now we are going to the witnesses. We are going to the witnesses now.

Now the following people have submitted statements to save time: Donald Baldwin, executive director, National Law Enforcement Council. Paul M. Weyrich, Free Congress, Research and Education Foundation. Patrick V. McGooghan, the Institute for Government and Politics. The Honorable Phil Neal, Neal, Gover & Eisenberg; Mr. Gerhardt Casper, office of the dean, University of Chicago, Law School; Honorable Charles S. Rhein, past president, American Bar Association. Gerald P. Regard, president, Family Research Council. William French Smith, former Attorney General. All in support of Mr. Rehnquist.

To save time, we are just going to put them in the record.

[Statement follows:]

NATIONAL LAW ENFORCEMENT COUNCIL

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Ordway P. Burden
Chairman

Donald Baldwin
Executive Director

Telephones: (202) 223-5598, 223-6850

July 28, 1986

The Honorable Strom Thurmond
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

Please submit for the record the enclosed statement of the National Law Enforcement Council in support of Associate Justice William H. Rehnquist, for Senate confirmation as Chief Justice of the United States Supreme Court.

This statement supporting Justice Rehnquist's nomination to Chief Justice of the Supreme Court is unanimously supported by the fourteen member organizations of the Council, representing over 300,000 law enforcement officers. The member national law enforcement organizations are listed in the attached statement.

Kindest regards,

Sincerely yours,

Donald Baldwin
Executive Director

Enclosure

REPRESENTING TWELVE NATIONAL LAW ENFORCEMENT ASSOCIATIONS WITH A
COMBINED MEMBERSHIP OF OVER 300,000 LAW ENFORCEMENT OFFICERS

Statement on Behalf of

The Honorable William H. Rehnquist
Associate Justice of the Supreme Court
For
Chief Justice of the Supreme Court of the United States

Before the Senate Judiciary Committee
July 29, 1986

Submitted by:

Mr. Ordway P. Burden
Chairman
National Law Enforcement Council
Suite 804
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

Senator Thurmond, and Members of the Senate Judiciary Committee, the National Law Enforcement Council, an umbrella group representing, through their executive heads, fourteen national law enforcement organizations, wishes to be on record in favor of President Reagan's nomination of U.S. Supreme Court Associate Justice William H. Rehnquist for Chief Justice of the Supreme Court. We believe Judge Rehnquist's fifteen years as an Associate Justice of the Supreme Court, his experience as Assistant Attorney General of the United States, as an active and successful attorney in private pratice, and his experience as a law clerk to a Supreme Court Justice, give the nominee the extensive background and experience we look for in our Chief Justice.

Judge Rehnquist demonstrated early in life an outstanding ability to learn, understand, and apply the law. As a student, he always stood first in his class. This was true in his secondary school years where he stood out as an outstanding student. He graduated first in his class at Stanford Law School in 1952 after receiving his B.A. "with great distinction", earning him election into the highest academic fraternity, Phi Beta Kappa. He also earned advanced degrees from Stanford and Harvard Universities.

Few have ever attempted to question this man's intellectual ability, or his understanding of the law, its application to the rights of our citizens, and the meaning of our Constitution as it applies to the rights of every citizen to protection under the laws of our country.

As members of the law enforcement/criminal justice community sworn to provide protection for every citizen against violence and rights guaranteed by laws and the United States Constitution, we feel that Judge Rehnquist has demonstrated his ability to interpret and write his findings in legal cases to protect the citizens of this great land of ours. We believe that his high intelligence and demostrated knowledge of the beliefs of our founding fathers as we know them in our Constitution, will help advance the needs of our law enforcement community to be able to act quickly, when necessary, to protect our citizens against law breakers, and violence associated with those that do not believe in upholding our laws.

This statement is being made on behalf of the following national law enforcement criminal justice organizations who have given their unanimous approval for this statement to be submitted to the Senate Judiciary Committee on behalf of Judge Rehnquist to be Chief Justice of the United States Supreme Court.

Associations of Federal Investigators
Federal Criminal Investigators Association
FBI National Academy Associates
Fraternal Order of Police
International Union of Police Associations
Law Enforcement Assistance Foundation
National Association of Police Associations
National District Attorneys Associations
National Sheriffs' Association
National Troopers Coalition
Society of Former Special Agents of the FBI
Victims Assistance Legal Organization
International Association of Chief of Police
Airborne Law Enforcement Association

The CHAIRMAN. Now we will proceed with the witnesses. We will take the panels just as they are given. The Honorable Rex Lee. Mr. Lee, you come around. The Honorable Erwin Griswold. Is he here? Is Mr. Griswold here? Mr. Griswold, you come around. And Mr. Robert Stern, is he here? If you will hold up your hands and be sworn.

Will the testimony given in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. LEE. I do.

Mr. GRISWOLD. I do.

Mr. STERN. I do.

TESTIMONY OF A PANEL CONSISTING OF HON. REX LEE, SIDLEY & AUSTIN, WASH., DC; HON. ERWIN N. GRISWOLD, JONES, DAY, REAVIS & POGUE, WASH., DC; AND HON. ROBERT STERN, MAYER, BROWN & PLATT, CHICAGO, IL

The CHAIRMAN. Have seats. We are going to allow you to put your full statement in the record, but we are going to limit the statements to 3 minutes. Mr. Lee, you may proceed for 3 minutes.

Mr. LEE. Mr. Chairman, members of the committee. I am honored to have this opportunity to testify in support of the nomination of William H. Rehnquist as the 16th Chief Justice of the United States.

Of all of the lawyers with whom I am acquainted, I know of literally no one who is better qualified to be Chief Justice of the United States than the nominee you are considering.

The most important considerations relevant to this confirmation fall into three categories: professional competence, integrity, and judicial temperament.

Justice Rehnquist is magnificently qualified in each of these respects. His abilities and his performance as a legal analyst and scholar can only be described as brilliant. Few persons have as extensive knowledge of the Court's precedents and the substantive areas with which it deals. I have appeared before Justice Rehnquist as an oral advocate 37 times. Many times he has voted in favor of the causes I have advocated, and many times he has voted against them. But always he has been fair. Always he has done his best to understand my position and also, my opponent's position.

No member of the Court is more effective than Justice Rehnquist in identifying an advocate's points of vulnerability and in my cases, he has never hesitated to do that, notwithstanding my resulting discomfort.

But he always does it in a context of due professional respect. I am confident that he also maintains that same professionally respectable relationship with the other members of the Court, thereby contributing to the Court's collegiality and effectiveness.

Mr. Chairman, may I make one final comment. While it is of course important that the Senate take the time necessary to perform properly its constitutionally ordained responsibility to advise and consent to this nomination, the Court, and therefore our Nation, suffer rather serious consequences when the Supreme Court is deprived of the services of one of its members for any period of time.

Because of the preparation required for the first October conference, the Court should be at full strength no later than the first part of September. For this reason I commend the members of this committee for the sensitivity that you have shown in moving both this nomination and that of Judge Scalia with such expeditious care. Thank you.

The **Chairman**. Thank you very much, Mr. Lee, and if you have any further remarks to go in the record, you are welcome to put them in.

Hon. Erwin N. Griswold. Dean Griswold, we are pleased to have you to make a statement.

STATEMENT OF ERWIN N. GRISWOLD

Mr. **Griswold**. Mr. Chairman, I served as Solicitor General of the United States for 6 years by appointment of President Johnson, and then continued in the first Nixon administration.

As a matter of fact, when I was a very young lawyer, my first job was 5 years in the Solicitor General's office, and during that time I played quite a role in establishing a new Office of Assistant Solicitor General.

When the department moved into the new building on Constitution Avenue, that office was right adjacent to the Solicitor General's office. That office, in course of time, became the Assistant Attorney General, Office of Legal Counsel, and it was because of that that I first met Mr. Rehnquist in January 1969, when he came to Washington.

Because our offices were adjacent, we saw each other frequently. We interchanged views about the legal problems of the Government quite frequently, and I quickly came to form a very high opinion of him in terms of his character and his ability.

I was very much pleased when he was nominated and confirmed for the Court. Like Mr. Lee, I have also appeared before him a good many times, probably not as many as 37, but a number of times, and because of my academic career of 33 years, I have been quite a student of the Supreme Court over the past good many years, including the current Court.

I have read the opinions. I think Justice Rehnquist's opinions are able, lawyer-like, important contributions to our constitutional and other law. In my opinion, he is extremely well qualified to be Chief Justice, and I am very glad to have the privilege of appearing here in support of the nomination.

The **Chairman**. Thank you very much, Dean Griswold. Honorable Robert Stern. Mr. Stern.

STATEMENT OF ROBERT STERN

Mr. **Stern**. Mr. Chairman, and Senators, I am now a practicing lawyer in Chicago but I was in the Department of Justice, mostly in the Solicitor General's office for 20 years, before I went to Chicago, and among other things, I am also an author of the book on Supreme Court practice which is now generally used. And I suppose that may be the reason I was asked to speak here.

Because of that, I have read all of the opinions of the Supreme Court, at least since 1950, including all of Justice Rehnquist's, although I must say I do not remember them all, but I have a general impression.

It seems to me that certainly he is more clearly qualified for the job of Chief Justice than anyone else can imagine. First of all, he has the advantage of having been a Justice and knowing the ropes and not having to learn them.

Second of all, we know that he gets along, personally, with all the members of the Court, including particularly, the three liberal members of the Court. And I want to quote to you what you probably know already: that Justice Brennan has recently stated, that in his opinion, "Rehnquist would be a splendid Chief Justice, and that his philosophical bent would not have much effect." I stress that, because like Justice Rehnquist, I am a Democrat. I probably would not vote for Justice Rehnquist if he were running for public office, but that does not mean I do not think he is amply qualified to be Chief Justice of the United States. The qualifications are the ones which have been stated to you already, and I think they are contained in the written statement which I have submitted.

[Prepared statement follows:]

STATEMENT OF ROBERT L. STERN

My name is Robert L. Stern. I have been a partner in the law firm of Mayer, Brown & Platt in Chicago since 1954. For 20 years before that I was in the Department of Justice. From 1941 to 1954 I was in the Solicitor General's Office, the last 4 years as First Assistant, and for most of the last year and a half as Acting Solicitor General, during both the end of the Truman Administration and the first year of the Eisenhower Administration. The Eisenhower Administration's only contribution to my departure for Chicago was to try to persuade me not to leave the Solicitor General's Office.

Most of my work in the Department, and all of it in the Solicitor General's Office, related to cases in the Supreme Court. In addition to a number of articles on subjects relating to the Court, I have been, since 1950, a coauthor of a treatise on Supreme Court Practice with Eugene Gressman; my partner, Stephen M. Shapiro, has joined us as author of the sixth, 1986 edition. Another book describing and comparing Appellate Practice in the United States, covering both state and federal courts, was published in 1981. In order to be able to keep those books up to date, it has been necessary for me to read all the Supreme Court opinions as they come down.

That, of course, means that I have read all of Justice Rehnquist's opinions. It doesn't mean that I now remember them all, or what was said in them. And I didn't have time to refresh my recollection before coming here. But I do have a reasonably clear general impression.

I should state at the outset, in case any of you think it relevant, that I regard myself as a moderate Democrat, which, as I have indicated, didn't prevent me from getting along well with moderate Republicans.

That may cause you to wonder why I should come here to support the nomination of Justice Rehnquist for Chief Justice. I can't say that I regard him as a moderate Republican. I might not even support him if he were running for political office. But the point is that he isn't. He has now been on the Supreme Court for 14½ years, and the question is whether he is qualified to be its Chief Justice. As to that I have no doubts.

In the first place, even though only two Justices have been promoted to the Chief Justiceship, there can be no doubt that the experience of serving on the Court for years gives a new chief a decided advantage. He knows what to do without having to learn it.

It also helps if he is able to get along personally with the other Justices. I know Justice Rehnquist, though not intimately, and am sure that he can get along with anyone. He is a likable, congenial, good-humored and unostentatious gentleman. And I understand that he has been particularly friendly with the liberal Justices--Douglas, Marshall and Brennan--even though he seldom agrees with them on anything controversial. I am sure you know that Justice Brennan has stated that Rehnquist would "be a splendid chief justice", and that his "philosophical bent" wouldn't have "much effect."

Of greater importance is that he has had the opportunity to show that he is qualified for the job. No one has questioned that he possesses the high intelligence and competence which are essential for membership on the Supreme Court.

I had also thought there was no question as to his integrity. Certainly that is true as far as I know, and as to his conduct as a member of the Court. I have, of course, been reading the papers since this hearing was scheduled and know that questions have been raised as to what he might have said and done long before he went on the Court. I have no knowledge as to such matters, and I understand that that is a subject which is ~~and [illegible]~~ be ing looked into by this Committee.

As far as his work is concerned, his opinions are well-written and to the point. I understand that he works and writes rapidly, which is important for a Chief Justice. The importance of that was revealed to me in conversations I had years ago with Justices Wiley Rutledge and Tom Clark, in which each wished that he could write as rapidly as Hugo Black. And a Chief Justice must do substantially more than his colleagues, both because he customarily begins the discussion of each case in conference by summarizing what it is about, and because he must devote a substantial amount of time to his second job as chief administrator of the federal judicial system.

Of course I would not support the nomination of Justice Rehnquist if I believed his decisions as a whole were harmful to the country. I don't always agree with his opinions, particularly on matters of race relations and some types of privacy. But I don't agree with some of the opinions of his colleagues either. How I would have decided the cases, however, is of no consequence to anyone, even to me.

The question is whether he is acting as an intelligent and conscientious judge should--giving heed to the considerations which should guide good lawyers after they become and must act as judges. Of course, judges should not be controlled by their personal predilections, as all of them recognize, and indeed as all of them on occasion charge colleagues who disagree with them with doing. And no one knowledgeable can expect judges' personal views and philosophies not to have some effect on their votes. But only within limits. And my reading of his opinions does not leave me with the impression that Justice Rehnquist disregards those limits more than do other Justices, even when I agree with the latter.

I can recall that when I began working on Supreme Court cases in the 1930s, the liberal lawyers'--and judges'--creed, as first pronounced and taught by Justices Holmes, Brandeis and Stone and then Professor Frankfurter, was that judges should not read the Due Process Clauses as embodying their own views as to what governmental conduct was undesirable and therefore unconstitutional. Justice Rehnquist, with some justification, now chides his liberal colleagues with abandoning the principles espoused by the great Justices of the 1930s although, of course, as to different subjects. As times and issues change, so does the emphasis that Supreme Court Justices, whether called liberal or conservative, place on one doctrine or another. A historical perspective--and perhaps going back 50 years, as I do, can be regarded as resorting to history--suggests that different approaches to that very important subject do not qualify or disqualify a person of great ability and integrity from appointment to the Court.

My reading of the opinions leaves me with the impression that the cases on which the Court divides are usually close and difficult ones which could reasonably go either way. As Justice Brennan has pointed out, many of the issues the Court has to decide "have two, and sometimes many more than two, legitimate and reasonable answers." More often than not I find myself persuaded by the opinions on both sides as I read them. A Justice who is otherwise qualified to carry on the work of the Court should not be deemed disqualified because of how he or she votes in such cases.

I do not mean that a Justice should never be rejected by the Senate because of his views and the way he votes. But a president elected by the people, whether he be Franklin Roosevelt or Ronald Reagan, has the right to nominate persons of his own philosophy. And a person who is otherwise fully qualified should not be rejected unless the Senate has good reason to believe that his votes would really be out of bounds.

There is no need to define this standard--which Justice Rehnquist clearly satisfies--more explicitly here. We are not dealing with a potential newcomer to the Court. Justice Rehnquist's record is open and available. He will remain on the Court whether he is confirmed as Chief or not. The real question is whether he is likely to be as good an administrator of the Supreme Court and the federal courts as anyone else who might be chosen. Justice Rehnquist's familiarity with the Court and his personality as well as his outstanding legal ability makes it unlikely that anyone better qualified to be Chief Justice can be found.

Accordingly, I believe his nomination should be confirmed.

The **Chairman**. Thank you very much. The distinguished Senator from Alabama.

Senator **Heflin**. I appreciate your testimony. I would like to ask each of you this one question. I will preface it first by a little explanation.

There is, maybe not generally, but there is a term of "the mainstream of judicial thought," and of the mainstream of judicial thought, people say there is a "right bank;" and there is a "left bank," but nevertheless, there is the mainstream of judicial thought.

Do you feel that Justice Rehnquist is within the mainstream of judicial thought and reasoning pertaining to race and gender issues?

The **Chairman**. Who are you asking the question of?

Senator **Heflin**. All, each of them, individually.

The **Chairman**. All right. You may reply.

Mr. **Lee**. I will lead out, Senator Heflin. In the first place, "mainstream of judicial thought" is really an amalgam or a composite of many different points of view, and it has always been that way, and that is part of the genius of our judicial system, as you know as a former judge.

I think really the thrust of your question is, are Justice Rehnquist's views unreasonable? Are they unlawyer-like? Are they unscholarly? Are they the kind of thing that would make him in any way unfit for service as the Chief Justice of the United States, and I have to say no. I think that his opinions and his views are properly respectful and cognizant of the Court's history and its precedents, and, in every way the kind of thing that we would expect from an accomplished jurist and a competent one.

Mr. **Griswold**. I would like to join in that same statement. There are a good many people who judge judges by whether they decide cases the way those people would like to have the cases decided.

I think the role of a judge is rather different than that. I think it is to try to find something to anchor to, to administer the law. Now I know that the law is not black and white, it is not always clear, and it changes, and the mainstream of legal thought goes this way for a while, and then that way for a while.

And that is largely the consequence of the ideas and arguments, and logic, and persuasion, which individual judges put into their opinions.

For many years, Holmes and Brandeis were regarded as the great dissenters. In the course of time their views were widely accepted.

I think that Justice Rehnquist's opinions have been lawyerlike, intelligent, intellectually based. I do not always agree with them but I find them very well worth considering and thinking about.

The **Chairman**. Mr. Stern.

Mr. **Stern**. Senator Heflin, I endorse what these gentlemen have said, but in addition I will add, that in the particular areas you mentioned, there are a number of Justice Rehnquist's opinions which I do not personally agree with.

On the other hand, there are other opinions of most of the other judges that I do not personally agree with either, which I do not think makes any difference.

My reaction—and again I quote what Justice Brennan has recently said—that many of the issues, of the close issues the Court has to decide, have two, and sometimes many more than two legitimate and reasonable answers.

More often than not, I add, when I read the opinions of the Court, I am completely persuaded by the majority opinion; then I am completely persuaded by the next opinion. And I come up with a conclusion that these are close, hard questions.

And I do not think that the fact that the Justices sometimes disagree with me, which is not of great consequence, or that they decide these one way or the other, does not indicate that they are not really qualified to be on the Court, or to be Chief Justice.

I think he is qualified to be Chief Justice for the reasons I mentioned. That is, he is familiar with the work, and so forth, and gets along very well with the Justices, other Justices. Also because he is a very fast worker. A Chief Justice has got to do more work, as you have heard already, than any other Justice, because he has got to summarize all of the cases which are explained to the Court at the conferences, and he has also of course got to be the chief administrator of the whole judicial system.

That is a hard job. You have got to be a fast worker to do it, and I think—he is going to be on the Court anyhow, he is going to stay on the Court anyhow, so the way he votes is not going to be affected by this. But the way he administers the Court I think may be very important.

And I just want to add one other thing. He said a good deal today about supporting the intercircuit panel proposal which is already before this committee.

And I am also on record before another part of this committee as supporting that proposal. So I endorse him for that reason also.

Senator **Heflin**. Thank you.

The **Chairman**. Any other questions, Senator? The distinguished Senator from Illinois.

Senator **Simon**. Thank you, Mr. Chairman. I welcome the panel, particularly Mr. Stern from the State of Illinois, obviously the stellar member of this panel.

I would like to follow my colleague's question. It is not only whether his opinions are scholarly, or lawyer-like, or well written. The Chief Justice is also a symbol of justice. Justice Rehnquist is a person of great ability, no question about it, for whom I have great respect.

He has been consistently on the side of holding back opportunity for minorities. May I ask the three of you: do you think, as a symbol for minorities in this country, Justice Rehnquist would be a good Chief Justice?

The **Chairman**. Who would you propound the question to, Senator?

Senator **Simon**. All three of them.

Mr. **Griswold**. I think, and I hope, that he will be. As an Associate Justice, he is just one of eight. As Chief Justice, he is the head of one of the three coordinate branches of the Government. I think he will take a broader view as Chief Justice than he has as an Associate Justice.

I think that he will also be under a different kind of pressure, just as I think Chief Justice Burger has been, as Chief Justice, to help to find consensus, to yield and bring the Court together on a common view on problems.

I am familiar with the speeches and papers which Justice Rehnquist has written over the past 12 or 15 years. I think that they will speak very well for a future Chief Justice of the United States.

The **CHAIRMAN**. And Mr. Lee, do you have any response to that?

Mr. **LEE**. Let me add only very briefly to those remarks, with which I am in complete agreement. Probably the best assurance that minorities, or any other group within our society can have, Senator Simon, of good law coming out of the Supreme Court, is that we put good people on the Supreme Court.

We are seeing now at work a core constitutional process. The only contact, the only direct effect that the people have on the court system, under our constitutional scheme, is through the President's power of appointment.

The people elect the President and then the President appoints the Chief Justice. I believe that the President has made his decision. He has chosen someone who is eminently well qualified, and one who operates not by himself, but as one of a nine-Member group, and I am not fearful that the rights of minorities or any other group within our system will be in any way threatened by this nomination which I think is in every respect a superb one.

The **CHAIRMAN**. Mr. Stern, do you have anything to say on that?

Mr. **STERN**. Just a little bit. I think that it is fair to say, that as of now, on the basis of his decisions in the past, which have not always been against minorities, but I guess they have been more against them than anybody else on the Court. But he would start out with a little handicap in that respect.

I think he is aware of that. Being in this position, as Dean Griswold said, makes a difference, and I think—for the future, I hope that he will react the way Dean Griswold has suggested.

Senator **SIMON**. I thank you.

The **CHAIRMAN**. The distinguished Senator from Delaware.

Senator **BIDEN**. Very briefly. Mr. Lee, who do you think elects us?

Mr. **LEE**. That is a good point, Senator, and I understand your point. But there is this one solid difference. The people who elected you and your colleagues were the people of the State of Delaware, and, the people of South Carolina, and the people of Alabama, and the people of Illinois.

There is only one point in our constitutional system at which elected officials—the President and the Vice President—are responsible to all of the people.

This is more than just, that is more than just a formal kind of notion, because there is a need for accountability. We need to have one place at which all of the people can look and say: That is the person who is on the Court because of the action of someone. We do not regard Chief Justice Warren, for example, as having been one who was confirmed by Dennis Chavez of New Mexico. Rather, he was one who was appointed by President Eisenhower, and that is the essential difference.

Senator BIDEN. Dean Griswold, it is really an honor to meet you. You are one of my heroes. I mean it, seriously; you are an incredible guy—in no way taking away from the rest of the panel—but I am a real admirer.

You said something I thought very illuminating. You said that you expect Justice Rehnquist to broaden his view, to be able to fulfill the role of Chief Justice.

Let me ask you: If you were convinced—which you are not—but if you were convinced that Justice Rehnquist would not broaden his views, but would narrow his views, would you vote for him for Justice Rehnquist?

Mr. GRISWOLD. Yes; I think I would. I think he is a lawyer of superb ability. He is a fine person. I have no question about his integrity. He cannot achieve results in the Court without persuading at least four other people to his view, and I think the converse of that is that he will not infrequently be persuaded by other people in reaching their view.

Senator BIDEN. Dean, one more——

Mr. GRISWOLD. There are some decisions of Mr. Justice Rehnquist with which I considerably disagree, but I do not think that proves he is wrong, or that he is not making an important contribution to the development of our law.

Senator BIDEN. I think he is making an important contribution. He is going to make it whether or not he is confirmed here. He is going to continue to make it, and I appreciate that.

I ask you, Dean, whether or not—has there ever been a Chief Justice, that any of you can recall, that has been—a Chief Justice—who has been so clearly representative of one end of the Court's spectrum, as Justice Rehnquist is?

Can any one of you ever remember anyone in history being——

Mr. GRISWOLD. Yes; I think that Chief Justice Taney, who had been attorney general for President Jackson in fighting the Bank of the United States, and had performed several other quasi-political functions for President Jackson was very strongly hated by the anti-Jacksonians, of whom there were not too many for a while, but after a while there became more of them.

That is of course an entirely different political and intellectual situation and problem. Actually, with respect to Justice Rehnquist, he has played a very limited political role for the past 15 years. His record has been as a Justice. As one of my friends in the Massachusetts court said, there is one thing being about a judge; everything you write gets published. And all that Justice Rehnquist has written over the past 15 years has been published, and is available to read. And I think that if people will read it carefully, they will find a great deal of good, and truth in it, rather than the occasional opinions which reach results which some people do not like and make quite a lot of noise about.

Senator BIDEN. Thank you, Dean.

The CHAIRMAN. The distinguished Senator from Iowa. Do you have any questions?

Senator GRASSLEY. Not of this panel.

The CHAIRMAN. Thank you, gentlemen, very much for your appearance, and we appreciate your coming and testifying.

Now, panel No. 2. We will ask these gentlemen to come forward. Representative Ted Weiss, president of Americans for Democratic Action. Senator Clarence Mitchell III, president of the National Black Caucus of State legislators. Dr. Gerald Horne, national director of the National Conference of Black Lawyers. Mr. John Crump, executive director of the National Bar Association. Ms. Denise Wilson-Taylor, women's division of the National Bar Association.

Will they please come forward?

None of them have notified us they will be present except Congressman Weiss.

Senator **Simon**. Mr. Chairman, there was some discussion about having some of the witnesses testify tomorrow morning. Are these among the witnesses for tomorrow?

Senator **Biden**. No, they were not.

Congressman Weiss is apparently voting and wanted to come tomorrow morning, is that right?

Mr. **Short**. That is correct.

The **Chairman**. They can submit their statements for the record, if they care to, and we will be glad to have their statements here.

[Prepared statement of Congressman Weiss follows:]

TESTIMONY OF CONGRESSMAN TED WEISS
PRESIDENT OF AMERICANS FOR DEMOCRATIC ACTION
ON THE NOMINATION OF WILLIAM REHNQUIST FOR CHIEF JUSTICE
JULY 30, 1986

Mr. Chairman, members of the Committee, I appreciate this opportunity to testify on the nomination of Justice William Rehnquist for Chief Justice of the Supreme Court. I speak today both as a member of Congress from the 17th district of New York, and as President of Americans for Democratic Action.

The ADA believes that the role of Chief Justice should be filled by a person who, whether liberal or conservative, has demonstrated a broad concern for protecting the constitutional rights of all citizens, including minority groups and those who hold minority opinions; and someone whose views on judicial matters are not divisive or ideologically extreme.

Although ADA has sometimes had reservations about Supreme Court nominees, rarely have we opposed one. In fact, the only nominations we opposed, other than William Rehnquist's in 1971, were those of Clement Haynsworth and G. Harrold Carswell, both of which were rejected by the Senate.

But we have found Justice Rehnquist so hostile to the rights of minority groups, so unconcerned about the abridgement of constitutional liberties protected under the Bill of Rights, and so polarizing and excessive in his doctrine, that we are compelled to oppose his elevation to the nation's most important unelected office.

The ADA came before this Committee in 1971 to express its concern about then-Assistant Attorney General Rehnquist's long standing antagonism towards the rights of black Americans to public accomodations, freedom of expression, education and voting. Today, after reviewing his 14 year record as an associate justice, we find our most troubling doubts about Justice Rehnquist have been confirmed. If anything, his antipathy towards civil liberties and minority groups has found dangerous new outlets.

Let me emphasize that we do not oppose Justice Rehnquist as a conservative: we have not opposed nominees who believe that in judicial matters, it is best to move conservatively and with special deference to precedent. Rather, we oppose Justice Rehnquist because his strident views are so extreme that they have left the Court's conservative voting bloc far behind.

His 47 lone dissents during his tenure on the Court illustrate the radical differences between his views and the views of his eight colleagues. For example, Justice Rehnquist was the sole dissenter in the Bob Jones University case, arguing that even though the university abided by an explicit code of racial discrimination, it should still qualify as a charitable organization, and hence receive federal tax benefits. Justice Rehnquist was impervious to the reasoning of his eight colleagues that status as a federally-recognized charitable organization was inconsistent with racial discrimination.

Another example of his adversarial views about minority groups is found in his dissent from the Court's decision to deny certiorari in Ratchford v. Gay Lib. By deciding not to hear the case, the Supreme Court let stand a lower court ruling that the University of Missouri could not deny an organization of gay men official recognition and access to campus facilities, on the basis of their homosexuality.

Justice Rehnquist's dissent was shocking for its vicious characterization of gay lifestyles and its casual dismissal of the First Amendment rights of the plaintiffs. After first depicting gay people as "akin to...those suffering from measles," Justice Rehnquist went on to argue that the group of gay students is not entitled to their First Amendment rights to peacefully assemble and hold public meetings, because he thought this might eventually lead to instances of sodomy, which was proscribed by Missouri state law.

In these and many other cases, Justice Rehnquist established himself on the fringe of jurisprudence, resolutely opposed to those seeking equal protection under the law. In Duren v. Missouri, he was the lone dissenter from a decision that a state may not automatically exempt women from jury duty, since it results in unfair trials for women; in Frontiero v. Richardson, he was the only dissenter from the Court's ruling that unreasonable discrimination on the basis of sex, in this instance for spousal benefits, is a violation of the Constitution; in Cruz v. Beto, he issued the sole dissent from the Court's conclusion that a state may not deny a prisoner reasonable opportunities to pursue his faith; in Richmond Newspapers v. Virginia, he was the lone dissenter from a decision that the press and the public have a right of access to criminal trials; and in Hathorn v. Lovorn, he issued the sole dissent from the Court's ruling that state courts are bound to enforce the Voting Rights Act.

These are but a few of many cases in which Justice Rehnquist displayed a belligerence towards civil liberties and equal protection that we feel must disqualify him for the position of Chief Justice.

I would like to make two final points about Justice Rehnquist. First, a close reading of his record on the Court shows that he is not a judicial conservative, as he likes to portray himself. He is rather, a judicial activist with an extreme right-wing agenda. He shows little inclination to move conservatively when an ideological issue is at stake. In fact, he seems ready to reverse much of the progress our nation has made over the last 25 years in the areas of equal protection, voting rights, and civil liberties.

Second, Justice Rehnquist is often said to apply a "majoritarian" analysis to his decisions, deferring whenever possible to the judgement of legislative bodies on contentious constitutional issues. I find this deference towards "elected bodies" distressing and anomalous, in part, because of Justice Rehnquist's 30 year record of hostility to voting rights.

But the more important objection is that this approach ignores the fundamental reason we have a Constitution, a Bill of Rights and a Supreme Court in the first place: to protect the rights of the minority from the excesses of a majority or of the government. A system of "justice" that defers to what is politically popular, rather than constitutionally justified, betrays both the Bill of Rights and the separation of powers.

As an organization dedicated to equal rights for all, the ADA is alarmed about the implications of having as Chief Justice a man who believes that the Bill of Rights does not extend to groups that are unpopular, or have no political clout.

Mr. Chairman, Americans for Democratic Action has scrutinized Justice Rehnquist's record on issues of equal protection, civil liberties, and voting rights. We believe his positions will further divide this country between the privileged and the poor, between black and Hispanic and white, between men and women, between homosexual and heterosexual, between the majority and the minorities. We feel that the role of Chief Justice must be filled by someone who will bring the country together, not polarize and embitter it. We believe it would be a calamitous mistake -- a mistake that time would not soon forgive -- to confirm as Chief Justice a man whose fundamental views are so inimical to the Bill of Rights.

For these reasons, Mr. Chairman, the ADA urges the Senate to reject Justice Rehnquist's nomination for the position of Chief Justice of the Supreme Court.

The **Chairman**. Panel No. 3. Dr. Henry Abraham. Dr. James Freedman. Mr. Craig M. Bradley. Dr. Abraham is from the University of Virginia, Woodrow Wilson, Department of Government. Dr. James Freedman is president of the University of Iowa. Mr. Craig M. Bradley, Indiana University, School of Law.

Dr. Abraham is not here.

If you will stand and be sworn. Raise your right hand.

Will the testimony you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

Dr. **Freedman**. Yes.

Mr. **Bradley**. Yes.

The **Chairman**. Have a seat.

Dr. Freedman, we will be glad to hear from you.

TESTIMONY OF A PANEL CONSISTING OF DR. JAMES O. FREEDMAN, PRESIDENT, UNIVERSITY OF IOWA, IOWA CITY, IA; AND MR. CRAIG M. BRADLEY, INDIANA UNIVERSITY, SCHOOL OF LAW, BLOOMINGTON, IA

Dr. **Freedman**. Thank you, Mr. Chairman. My name is James O. Freedman, and I have been president of the University of Iowa since 1982. Before that, I served for 18 years on the law faculty of the University of Pennsylvania, the last 3 years as dean.

My association with Justice Rehnquist dates backs exactly 7 years to July 1979 when we served together on the five-member faculty of the Salzburg Seminar in American Studies. Every summer that seminar in Salzburg, Austria, draws together 50 European lawyers for a 3-week period of instruction on American law and legal institutions.

During those 3 weeks in July 1979, I had the opportunity to attend Justice Rehnquist's lectures on American constitutional law, to join him in teaching a seminar on certain other aspects of American law and to observe him daily in the dining hall, the lecture hall, and talking with students on social occasions.

This experience left me with a deep impression of the strength of Justice Rehnquist's character and the depth of his intellect. In the classroom, Justice Rehnquist's lectures were a model of conscientious preparation and scholarly self-discipline. They were fair, balanced, appropriately skeptical of much conventional wisdom, and creative in their assessment of the relationship between American law and American political and social institutions.

They bore the mark of a powerful mind and a spacious imagination governed by standards that would not tolerate shallowness or shoddiness of generalization.

I want to make a particular point of Justice Rehnquist's attitude toward the 50 European lawyers, because if they had expected a Justice of the United States Supreme Court to be distant, forbidding, or chilly in his personal relationships, they very soon found that that stereotype was not true. For all of the stature and prestige of his position, Justice Rehnquist was genuinely approachable.

He was a humane and decent presence in the classroom, in the dining room, in the after dinner coffee conversation, and he conveyed to the students an authentic interest, warmth, and modesty.

I want, Mr. Chairman, to make one final point which, so far as I know, has not been made during these 3 days of public hearings. Those who bear the heavy responsibilities of judicial office frequently find that their entire being is consumed by their public self.

Justice Rehnquist is one of those rare public figures who has recognized the importance of cultivating a private self, a self dedicated to the development of this own powers of creativity, of humane understanding, and of cultural appreciation.

The fact, indeed, that he has recently taken to learning painting, as some of you may know from the newspapers, suggests the importance that he properly attaches to the cultivation of a private self.

Judges who cultivate a private self, something of a harbor from the turbulance of public life, renew themselves by reflection and contemplation in ways that, in my judgment, enrich their contribution to the public service.

In short, I regard Bill Rehnquist as a person of rare qualities of character and mind, and I am pleased to endorse his nomination as Chief Justice of the United States.

[Prepared statement follows:]

TESTIMONY OF JAMES O. FREEDMAN
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF WILLIAM H. REHNQUIST AS
CHIEF JUSTICE OF THE UNITED STATES
JULY 30, 1986

My name is James O. Freedman and I have been President of the University of Iowa since 1982. Before that, I served for eighteen years as a Professor of Law at the University of Pennsylvania Law School, having been Dean of the Law School from 1979 to 1982.

I am grateful for the opportunity to appear before this Committee to express my high regard for Justice William H. Rehnquist. Because it is now more than four years since I left the ranks of legal scholars in order to become an educational administrator, I will not speak, as so many others will, to Justice Rehnquist's career on the Supreme Court of the United States. Instead, I will direct my remarks to Justice Rehnquist's character, integrity, and intellectual ability.

My association with Justice Rehnquist dates back exactly seven years, to July 1979, when we served together on the five-member faculty of the Salzburg Seminar in American Studies. The Salzburg Seminar was founded in 1947 by a group of idealistic young Americans for the purpose of providing a European forum for the exploration of significant aspects of American society. Every summer it holds a three-week session on American law and legal institutions at Schloss Leopoldskron, the former home of Max Reinhardt, in Salzburg, Austria. The student body is composed of approximately fifty lawyers -- practitioners, judges, civil servants, professors, and corporate counsel -- from the nations of Western Europe, Eastern Europe, and the Middle East.

During those three weeks in July 1979, I had the opportunity to attend Justice Rehnquist's lectures on American constitutional law, to join him in teaching a seminar on certain aspects of the American criminal justice system, and to be with him daily, in the classroom, in the dining hall, and at social occasions. This experience left me deeply impressed by the strength of his intellect and character.

In the classroom, Justice Rehnquist's lectures were a model of conscientious preparation and scholarly self-discipline. They were fair, balanced, appropriately skeptical of much conventional wisdom, and creative in their assessment of the relationship between the growth of American law and the development of American political and social institutions. They bore the mark of a powerful mind and a spacious imagination governed by standards that will not tolerate shallowness of thought or shoddiness of generalization.

As Justice Rehnquist outlined the historical development of American law in the Nineteenth Century, he explored the distinctive interplay of such aspects of the American experience as the intellectual heritage of the common law, the Westward Movement, the growth of economic enterprise, the industrialization of cities, the rise of the railroads, and the pressure of sectional interests. He described how American judges, lawyers, political officials, and citizens sought to create a body of law out of what Perry Miller has called a "confused and confusing complex of emotions, traditions, and aspirations."

He regarded the growth of the law in the Nineteenth Century as an essential episode in the history of the American mind. And he conveyed the general temper of the times, the anguished hopes and optimistic efforts of a new nation to govern itself effectively and justly, with an admirable intellectual elegance and precision.

If the fifty students attending the Salzburg Seminar in July 1979 had expected a Justice of the United States Supreme Court to be distant, forbidding, or chilly in his personal relationships, they were soon disabused of that stereotype. For all the stature and prestige of his position, Justice Rehnquist was genuinely approachable. He was a humane and decent presence in the classroom, in the dining hall, and in the after-dinner coffee conversations. He conveyed to the students an authentic interest, warmth, and modesty.

Those who bear the heavy responsibilities of judicial office frequently find that their entire being is consumed by their public self. Justice Rehnquist is one of those unusual public figures who has recognized the importance of cultivating a private self dedicated to the development of his powers of creativity, of humane understanding, and of cultural appreciation. The fact that he continues to read and write as extensively as he does, and that he has recently taken to learning to paint, suggests the importance he properly attaches to the cultivation of a private self. Judges who preserve a private self -- a harbor from the turbulence of public life -- renew themselves by reflection and contemplation in ways that enrich the contributions they make by their public service.

William H. Rehnquist is a person of rare qualities of mind and character, qualities that will bring distinction to the office of Chief Justice of the United States. They are qualities the Nation should cherish in the Chief Justice of a Court with the ultimate responsibility for administering those wise restraints that make us free.

The **Chairman**. Thank you very much, Dr. Freedman, and Mr. Bradley, you have 3 minutes.

Mr. **Bradley**. Thank you, Mr. Chairman.

The **Chairman**. If you do not get through, you may put your whole statement in the record.

STATEMENT OF CRAIG M. BRADLEY

Mr. **Bradley**. I am a professor of law at Indiana University and a former law clerk to Justice Rehnquist. However, I am also a political moderate, a registered Democrat, and I am on record as not always agreeing with Justice Rehnquist's decisions.

I want to speak to two matters, neither one of which has been addressed explicitly. First of all is Justice Rehnquist's integrity as a Supreme Court Justice. Many issues as to his integrity have been raised in the years prior to when he was a Supreme Court Justice, but no one has really talked about his performance and his character in the role of a Justice.

As a law clerk to him in 1975, I saw him at extremely close quarters for as many as 60 hours a week. My office had an open door. His office had an open door. I was pretty much aware of whom he saw, whom he talked to on the phone, what he did after work as well as what he did during work.

I also should add that I was a senior trial attorney in the Public Integrity Section of the Justice Department. So I am something of an expert on the question of the integrity of public officials.

Justice Rehnquist's integrity was almost amazing to me. The modesty of his lifestyle and the modesty of the manner in which he treated his underlings, not only his law clerks but his secretaries, was that of a man who did not abuse in any way his position.

I developed the greatest admiration for the simplicity of his life and the feeling that this was a man who was open to every viewpoint. He frequently did not decide the way that I wanted him to decide, but he was open to my arguments invariably and with great patience.

His personal life I would describe as a life of quiet inspiration. He went home at night. He read. He did not make the scene in Washington, and I considered his integrity to be extremely high.

Now, criminal procedure is my field, and I have studied Justice Rehnquist's criminal procedure decisions and I have submitted a draft of an article to this committee. I apologize for any spelling errors. I know this committee has taken spelling errors seriously in recent times.

Senator **Biden**. Now, now. [Laughter.]

Mr. **Bradley**. But it is an early draft. And my conclusion, without going into the details of Justice Rehnquist's criminal procedure decisions, is that he cannot be described as an extremist. He cannot be described as a knee-jerk conservative.

He has, in fact, explicitly joined virtually all of the major decisions of the Warren Court, for instance, *Gideon* v. *Wainwright*, extending right to counsel to felony trials. He has not only joined it. He has concurred in the result and joined most of *Argersinger* v. *Hamlin* which extended it to misdemeanor trials.

He has, in a similar vein, joined the other major opinions of the Warren Court. I turn you to my submitted paper for the details.

[Prepared statement follows:]

The "Rehnquist Court" in Criminal Procedure

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The nomination of Justice William Rhnquist for the post of Chief Justice of the Supreme Court has caused considerable consternation in liberal circles. Whereas the product of the Burger Court has aptly been termed "the counterrevolution that wasn't"[1] it is feared that Chief Justice Rehnquist may have the will, the intellect and, most importantly the votes, to make serious inroads into the structure of federally enforced constitutional rights that was erected by the Warren Court.

For example, Anthony Lewis editorializing in the New York Times, strongly criticized the choice of Justice Rehnquist for Chief Justice. He termed Rehnquist an "Activist" who is willing "to override precedent, (and) to reshape constitutional traditions in radical ways...."[2] He foresees "drastic limitation of the Court's role as the protector of American liberties" and a country "in which our freedoms are less secure, official power less retrained...." He concludes that "the American people will not be happy with a Supreme Court reconstructed in President Reagan's image."[3]

Yet this same Anthony Lewis, in his foreward to The Burger Court: The Counter-Revolution That Wasn't, was sanguine about the current state of the law, expressing the view that the Warren Court doctrines "are more securely rooted now than they were in 1969." In the same book, Professor Kamisar, commenting on the state of criminal procedure law, similarly averred that "the intensity of the civil libertarian criticsm of the Burger Court in the police practices area 'relates less to what the Court has done than to what the critics fear(ed) it (would) do.'"[4]

This article will attempt to determine just what Justice Rehnquist's position is on the various issues that make up criminal procedure law[5] and to assess the chances that, to the extent that those views differ in substantially from current doctrine, they will become law in the future.

The Burger Court Decisions

Professors Israel, Salzburg and Kamisar have all ably and thoroughly analyzed the work of the Burger Court in criminal procedure.[6] I will not repeat these efforts, but rather provide the briefest possible sketch of developments in the last decade and a half.

In general, these decisions can be seen as a retreat from, rather than a rout of, the Warren Court decisions. In the search and seizure area, the exclusionary rule and the (often excepted) warrant requirement were retained. However, the establishment of probable cause by the police was made easier,[7] and a good faith exception to the warrant requirement was created.[8] Standing requirements were tightened[9] and Fourth Amendment claims were barred from collateral attack in federal counts.[10] Consent searches were made easier.[11] The scope of warrantless automobile searches,[12] and searches incident to arrest[13] (including automobile searches incident to arrest)[14] was greatly expanded.

While the Courts search decisions were essentially uniform in favoring the police,[15] it took a greater interest in the rights of defendants in cases involving seizure of the person. While in United States v. Watson[16] the Court did hold that warrantless arrests of felony suspects may be effected on probable cause, it required an arrest warrant to arrest a suspect in his home[17] and a search warrant to arrest him in the home of another.[18] In Dunaway v. New York,[19] the Court made it clear that detention of a suspect for custodial "questioning" by the police must be justified by probable cause, whether or not the police considered their act an "arrest." And, in Dunaway and Brown v. Illinois[20] the Court would not allow Miranda warnings alone to "purge the taint" of such an illegal arrest such that a confession made by the arrestee could be used. Rather, the confession must, on all the facts, be found to be an act of "free will."[21] Thus a possible incentive to the police to perform illegal arrests in hopes of gaining an incriminating statement from the suspect was largely dispelled.

Further, the Court limited the application of Terry v. Ohio[22] by forbidding frisks of those present at a premises that was being searched pursuant to a search warrant, absent the individualized suspicion as to dangerousness required by Terry.[23] In Delaware v. Prouse[24] it similarly forbade random stops of automobiles for drivers'license and registration checks. Finally in Gerstein v. Pugh[25] it forbade "extended" detention of an arrestee unless he is brought before a judicial officer for a determination of probable cause.

In the interrogation area, the Court's decisions have been similarly balanced, not allowing Miranda v. Arizona[26] to be expanded, but showing some sensitivity to the rights of criminal suspects -- even rights that were never recognized until Miranda itself.

In the early 70's it appeared that the Court, as Professor Stone observed,[27] was paving the way to overrule Miranda. It allowed statements obtained from a suspect in violation of Miranda to be used to impeach him at trial,[28] and allowed requestioning by police even after the defendant had asserted his right to silence.[29] It permitted the prosecution to use evidence which was the "fruit" of an unwarned statement[30] and termed the Miranda warnings merely "prophylactic standards" designed to protect the constitutional right against self-incrimination rather than constitutional rights themselves.[31]

On the other hand, while concluding that a suspect had not been subject to interrogation in a police car when he told police where to find a murder weapon, the Court extended Miranda to any custody (not just stationhouse custody) and defined "interrogation," rather broadly, as including "any words or actions on that part of the police (other than those normally attendant to custody) that the police should know are reasonably likely to elicit an incriminating response."[32]

In Edwards v. Arizona[33] the Court distinguished between assertion of the right to silence by a suspect and right to counsel, holding that after the latter assertion interrogation must (really) cease until counsel has been made available -- no second tries by police unless the defendant "initiates" further conversation.[34] Also, in *Estelle v. Smith*[35] the Court held that both the Fifth and Sixth Amendment rights of a defendant were violated when he was subjected to a psychiatric interview (which led to testimony against him at the "death phase" of his murder trial) without receiving *Miranda* warnings and without his counsel having been notified. Recently, in *Beckemer v. McCarty*,[36] the Court extended the *Miranda* requirement to all crimes, including misdemeanor traffic offenses. The other significant pro-defendant interrogation case, *Brewer v. Williams*,[37] didn't involve *Miranda* at all but, instead, resurrected the pre-*Miranda* decision in *Massiah v. United States*[38] in holding that once adversary proceedings had begun against a defendant the police could not "deliberately elicit" incriminating statements from him.[39]

Recent cases have not all gone for defendants. In *New York v. Quarles*[40] the Court established a "public safety" exception to the requirement that the police give *Miranda* warnings. In *Oregon v. Elstad*[41] they held that the "fruit of the poisonous tree doctrine" did not operate to exclude a second, warned, statement by a suspect that followed a prior unwarned one. Finally, in *Moran v. Burbine*[42] they held that a suspect's waiver of his *Miranda* rights was initiated neither by the failure of police to tell him that a counsel retained for him by a third party is attempting to reach him, nor by the police assuming counsel that he would not be interrogated when, in fact, he was.

In the third major area of pretrial rights, involving identification procedures, the Burger Court, in *Kirby v. Illinois*[43] effectively gutted the 1967 requirement of *United States v. Wade*[44] that counsel must be present at a lineup by limiting that holding to *post indictment* hearings. Since most lineups are for the purpose of finding out if the police have the right man, they are, of necessity, *pre-indictment*. In fact, neither *Wade* nor *Kirby* represents the most sensible approach to lineups which is to require them to be either photographed and tape recorded or videotaped if they are to be used in Court. As anyone who has actually been to a lineup knows, there is nothing for defense counsel to do there except to see if the procedure is unfairly suggestive of his client as the criminal, and complain about it later to the court. This can be better achieved by recording the proceedings.

Justice Rehnquist's Views

In all of the cases discussed above, with two exceptions,[45] Justice Rehnquist either voted against the defendant, or, concurring in the result, expressed serious reservations about a pro-defendant opinion. No other Justice approached him in maintaining such a consistant stance in favor of the views advanced by law enforcement. Does this mean that if Chief Justice Rehnquist could attract a majority to his view point, criminal procedure law would return to its pre-Warren Court state? In my view, the answer is no.

In assessing Justice Rehnquist's views of criminal procedure it is important to recognize those aspects of the Warren Court innovations with which he does *not* disagree. To discuss criminal procedure rights without mentioning trial rights is, to expand on Professor Kamisar's phrase, like playing *Hamlet* without Hamlet.[46] In my view the most significant decisions by the Warren Court were *Gideon v. Wainwright*[47] that extended the Sixth Amendment right to counsel to state felony defendants and *Douglas v. California*[48] and *Griffin v. Illinois*[49] that accorded indigent defendants the rights to counsel and a free transcript on appeal. Without counsel to represent a defendant at trial and the opportunity to bring an effective appeal, other constitutional rights, such as that of proof beyond a reasonable doubt, as well as pretrial rights, could be ignored. Justice Rehnquist has never expressed any disagreement with these cases, nor with other key cases that ensure criminal defendants a fair trial in state and federal courts.[50] Indeed, he joined Justice Powell concurring in the result in *Argersinger v. Hamlin*[51] which extended the right to counsel to misdemeanor cases. Powell and Rehnquist agreed that an indigent should have appointed counsel at least whenever he is entitled to a jury trial. "If there is no accompanying right to counsel, the right to trial by jury becomes meaningless."[52] They would have extended the right to counsel beyond jury trials to "whenever (it) is necessary to assure a fair trial"[53] but not necessarily to every case where the defendant might be imprisoned, as the majority held.[54]

In his dissenting opinion in *Taylor v. Louisiana*,[55] Justice Rehnquist further explicated his basic agreement with the application of fundamental trial rights to the states through the Fourteenth Amendment, quoting from *Duncan v. Louisiana*:[56]

> "The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those '"fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"' *Powell v. Alabama*, 287 U.S. 45, 67 (1932); whether it is 'basic in our system of jurisprudence,' *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is 'a fundamental right, essential to a fair trial,' *Gideon v. Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *Pointer v. Texas*, 380 U.S. 400, 403 (1965).... *Because we believe that trial by jury in criminal cases is fundamental to the American shceme of justice*, we hold that the Fdourteenth Amendment guarantees a right of jury trial in all criminal cases...."[57]

Justice Rehnquist described this as "a sturdy test...."[58] The cases cited in the above passage from *Duncan* provded for right to counsel first in capital (*Powell*) and then all felon (*Gideon*) cases, extended the Fifth Amendment right against self imcrimination to the states (*Malloy*); extended the Sixth Amendment confrontation right to the states (*Pointer*) and forbade secret criminal proceeedings (*Oliver*).

Of course, the mere fact that Justice Rehnquist quoted this passage from *Duncan* in a dissent does not necessarily mean that, if he had the votes, he would not, for example, decide to overrule *Malloy v. Hogan*. However, Justice Rehnquist has not been shy about expressing his disagreement with key Warren Court decisions, even though he knew he lacked the votes to change them.[39] Even if, when he came on the Court fourteen years ago, he might have been inclined to overrule a case such as *Malloy*, it would be truly extraordinary for him, after fourteen years of *explicit* acceptance of such cases, to then turn around and overrule them. Accordingly, I shall assume throughout this article that, when Justice Rehnquist expresses acceptance of a given doctrine, he means what he says.

In addition to acceptance of the fundamental precepts discussed above, Justice Rehnquist has agreed that a state cannot compel a defendant to stand trial in prison clothes[40] and that a defendant cannot be prevented from consulting with his counsel during a recess in the trial.[41] Similarly, he authored the unanimous opinion in *Burch v. Louisiana*[42] holding that the conviction of a defendant for a non-petty offense by a non-unanimous six member jury violates the defendant's right to trial by jury and joined *New Jersey v. Portash*[43] (despite a dissent by Justice Blackmun and the Chief Justice) which held that testimony given before a grand jury under a grant of immunity could not be used to impeach the defendant at trial. Also, he joined a unanimous opinion in *Burks v. United States*[44] holding that double jeopardy barred retrial of a defendant whose conviction had been reversed by an appellate court based on insufficiency of evidence. He even joined Justice Brennan's opinion in *Goldberg v. United States* taking a rather expansive view of the defendant's right to receive the prosecutor's notes of a witness interview under the Jenchs Act despite the fact that four other Justices expressed reservations about the scope of the opinion.[45]

More recently, Justice Rehnquist further demonstrated his adherence to the notion that the federal Constitution (and the federal courts) should guarantee fundamental *trial* rights when he joined a unanimous Court in *Crane v. Kentucky*,[46] reversing the Kentucky Supreme Court's holding. In *Crane*, the Court held that a defendant at trial must be allowed to introduce evidence as to the circumstances under which a confession was given in an effort to show that the confession was unworthy of belief.

None of the above is designed to show that Justice Rehnquist is the "defendant's pal" when it comes to trial rights. Indeed, many decisions could be mustered to make the opposite case. Rather, the point is that he is not a "knee jerk conservative," ready to vote against the defendant no matter what the circumstances and unconcerned about the possibility of a defendant not being allowed to make an adequate defense. Instead, the cases just discussed show that he, like all of the other Justices, is prepared to weigh the interests of the state in convicting the guilty against the interests of the defendant and to try to reach a conclusion that comports with his understanding of the Constitution.[67]

As Justice Rehnquist stated in his majority opinion in Illinois v. Gates:[68]

> "Fidelity" to the commands of the Constitution suggests balanced judgement rather than exhortation. The highest "fidelity" is achieved neither by the judge who instinctively goes furthest in upholding even the most bizarre claim of individual constitutional rights, any more than it is achieved by a judge who instinctively goes furthest in accepting the most restrictive claims of governmental authorities. The task of this Court, as of other courts, is to "hold the balance true" and we think we have done that in this case.

As to the Fifth Amendment, while Justice Rehnquist has rather consistently voted to cut back the scope of Miranda v. Arizona[69] and has also urged that Massiah v. United States[70] be overruled[71] nevertheless it seems clear that he has now accepted the Miranda decision as well as certain of the key subsequent decisions that gave it added significance. If this is true, then he joins Chief Justice Burger in this view. As Burger stated in his concurring opinion in Rhode Island v. Innis:[72]

> The meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its strictures. I would neither overrule Miranda, disparage it, nor extend it at this late date.[73]

At least it would seem to be true, that Justice Rehnquist, along with the rest of the Burger Court, accepts the "basic premise" of Miranda "that the defendant's right against self-incrimination applies to police custodial interrogation"[74] and not just at trial.

In 1974, Justice Rehnquist wrote the Court's opinion in Michigan v. Tucker[75] which, in deeming the Miranda warnings merely "prophylactic rules" rather than a constitutional right of the defendant, seemed, as Professor Stone has observed "certainly to have laid the groundwork to overrule *Miranda*."[76] Moreover, he joined the dissent in *Doyle v. Ohio*[77] when the majority held that a defendant's post-warning silence could not be used against him. He agreed with the majority in *Oregon v. Haas*[78] that a defendant could be impeached with statements made after he had asked for a lawyer and been wrongly questioned further and joined a majority in *Michigan v. Mosely*[79] holding that a defendant who had asserted his right to silence could be questioned later as to another offense.

However, whatever his initial reservations about *Miranda*, in recent years he seems to have accepted the opinion. In *Wainwright v. Greenfield*,[80] concurring in the result, Justice Rehnquest "agree(d) ... that our opinion in *Doyle v. Ohio*, shields from comment by a prosecutor a defendant's silence after receiving *Miranda* warnings, even though the comment be addressed to the defendant's claim of insanity."[81] In *Edwards v. Arizona*[82] he joined Justice Powell concurring in the result but agreeing with the majority that Edward's interrogation "clearly was questioning under circumstances incompatible with a voluntary waiver of the fundamental right to counsel."[83] Finally, in *Berkemer v. McCarty*,[84] he joined, without reservation, a Court opinion that applied *Miranda* to any custodial interrogation "regardless of the nature or severity of the offense for which (the defendant) is suspected or for which he was arrested (but that "roadside questioning" of a motorist pursuant to a traffic stop does not constitute "custodial interrogation.")[85]

The concessions in the above cases may be viewed as merely tactical -- drafting or joining a relatively narrow opinion without really conceding that, should the opportunity arise, Justice Rehnquist would vote to overrule *Miranda*. Still, as noted, after more than a decade of acceeding to *Miranda*, however grudgingly it would be difficult for Justice Rehnquist to then write an opinion overruling it. Moreover, it is quite clear that if he did so, he would not be able to attract a majority of votes.

In the Fourth Amendment area, Justice Rehnquist has been much more consistent in voting against defendants. This is because of his belief that

> the so-called "exclusionary rule" created by this Court imposes a burden out of all proportion to the Fourth Amendment values which it seeks to protect.[66]

This belief is shared by Chief Justice Burger,[67] as it was by Justices Harlan, Frankfurter and Whittaker who dissented in Mapp v. Ohio,[68] and many others.[69]

Given Justice Rehnquist's view that it is irrational to "let the criminal go free because the constable blundered" it is not surprising that he is generally inhospitable to claims of criminal defendants that their convictions should be reversed because of the trial courts failure to suppress evidence that has allegedly been illegally seized. Rehnquist believes that, whatever the appropriate remedy, it includes neither the suppression of evidence at trial nor the reversal of convictions for failure to suppress.[70] Having failed to convince his colleagues that illegally seized evidence should not be excluded, he tends to argue in each case that the evidence in question was not illegally seized. Sometimes he is successful in the endeavor as in United States v. Robinson[71] where the Court, per Justice Rehnquist, held that a search incident to any custodial arrest (even for a traffic offense) was appropriate as long as the arrest was based on probable cause, even though there was no additional justification for the search.[72] Other times he fails, as in Delaware v. Prouse[73] where an 8-1 majority, over Rehnquist's dissent prohibited random stops of automobiles by police for drivers license and registration checks. Similarly, in Dunaway v. New York,[74] a 6-2 majority held that picking up a suspect "for questioning" was an arrest, regardless of what the police called it, and consequently was illegal if not based on probable cause. Justice Rehnquist, joined by the Chief Justice in dissent agreed that such detainment could be an arrest and that probable cause was lacking but argued that, in this case, the defendant accompanied the police voluntarily.[75]

Another tactic employed in the Fourth Amendment area by Justice Rehnquist and the more conservative Justices is to argue that, whether or not a search was illegal, the defendant is foreclosed from raising the issue. The most significant opinion by Justice Rehnquist in this regard is Rakas v. Illinois[96] in which the Court took a rather narrow view of a defendant's standing to raise Fourth Amendment claims in holding that a passenger of a car may not raise the issue of the illegality of the search of that car. Similarly, in Stone v. Powell[97] the Court per Powell J., held that Fourth Amendment claims could not be entertained on federal habeas corpus. In United States v. Havens,[98] a 5-4 majority per Justice White, allowed the government to use illegally seized evidence to impeach the defendant's testimony, even as to matters first raised by the preosecutor on cross-examination. However, in Franks v. Delaware[99] a 7-2 majority struck down a state rule that forbade a defendant from challenging the veracity of the police in a search warrant affadavit.

A slightly different, but related tactic is, having failed in case A to persuade a majority that a given police search was appropriate under the Fourth Amendment, to argue in case B that case A is not retroactive. This Justice Rehnquist did successfully in United States v. Peltier[100] in which the Court held that Almeida Sanchez v. United States[101] was not retroactive.[102]

There are, however, limits to the police behavior that Justice Rehnquist will countenance under the Fourth Amendment. In Lo Ji Sales, Inc. v. New York,[103] Justice Rehnquist joined a unanimous Court in striking down an open ended search warrant and the participation of the judge who issued the warrant in the search. In Brown v. Texas[104] he again joined a unanimous Court in striking down a state statute that required people to identify themselves to the police. In Mincey v. Arizona he explicitly agreed with the majority that there should be no murder scene exception to the Fourth Amendment warrant requirement.[105] In the recent case of New York v. PJ Video[106] he recognized, in writing the majority opinion, that "police may not rely on the 'exigency' exception to the Fourth Amendment's warrant requirement in conducting a seizure of allegedly obscene materials, under circumstances where such a seizure would effectively constitute a prior restraint."[107] In Hayes v. Florida,[108] he joined a unanimous Court in reversing the Florida courts and holding that in the absence of probable cause or consent, it was an unconstitutional seizure for police to take a suspect to the station for fingerprinting and the fingerprints must be suppressed.[109] Finally, and most significantly, in *Gerstein v. Pugh*[110] he joined a unanimous Court decision that required, under the Fourth Amendment, a judicial determination of probable cause as a prerequisite to extended restraint on a suspect's liberty following an arrest.

Justice Rehnquist clearly recognizes that too much power in the hands of the police can be dangerous. In general, however, his Fourth Amendment jurisprudence has been informed by the view that the Warren Court went too far in the other direction, according to the criminal defendant too many rights and allowing the crime problem to threaten the civil liberty of the people. In a speech at the University of Kansas[111] he observed that

> No thinking person would suggest that we are precisely where we want to be in the process of balancing claims for privacy against other governmental interest or that every new claim of privacy should be rejected simply because it might marginally impair the efficiency of law enforcement. In Hitler's Germany and Stalin's Russia, there was very efficient law enforcement, there was very little privacy, and the winds of freedom did not blow.[112]

However, he also noted that

> If the claim to privacy may be idealized in terms of individual human dignity, the claim of fair and efficient administration of the law may be idealized in terms of the *sine qua non* of a self-governing society. To the extent that a society is unable to enforce the laws it has enacted, it is not a self-governing society. Nor is it a society in which civil liberties and privacy are secure.[113]

The "constitutionality of a particular search" in Justice Rehnquist's opinion, "is a question of reasonableness and depends on 'a balance between the public interest and the individual's right to personal security free from aribtrary interference by law officers."[114] Given Justice Rehnquist's view of the exclusionary rule and his view that the Warren Court had gone overboard in guaranteeing the rights of criminal defendants[115] it is not surprising that he has consistently endeavored to cut back on those rights. However, as illustrated above, he has his limits.

Rehnquist as Chief Justice

Heretofore the discussion has centered on Rehnquist's past views as an Associate Justice. However there is reason to believe that he may moderate some of the views expressed in those cases in an effort to lead the Court as the Chief Justice. In the first place, he considers the "law dealing with the constitutional rights of criminal defendants ... more evenhanded now than it was when I came on the Court.[116] Obviously, then the sense of mission that he had when he joined the Court, to "call() a halt to a number of the sweeping rulings of the Warren Court"[117] in the criminal procedure area has now been fulfilled. He now recognizes that "there probably are things to be said on both sides of issues that perhaps I didn't think were"[118] when he came on the Court in 1972.

He views one's "major contribution" on the Court as "putting something together yourself or joining something someone else puts together that commands a Court opinion."[119] In a speech entitled "Chief Justices I Never Knew"[120] he described the role of the Chief Justice:

> Although his vote carries no more weight than that of his colleagues, the chief justice undoubtedly influences the Court and its decisions. When a new chief accedes to the bench, newspaper editorials often suggest that by either his "executive" or his "administrative" ability he will somehow "bring the Court together" and eliminate the squabbling and bickering thought to be reflected in decisions of important issues by a sharply divided Court. The power to calm such naturally troubled waters is usually beyond the capacity of any mortal chief justice. He presides over a conference not of eight subordinates, whom he may direct or instruct, but of eight associates who, like him, have tenure during good behavior, and who are as independent as hogs on ice. He may at most persuade or cajole them.

To the extent that Justice Rehnquist's positions have been extreme compared to the other Justices, it is reasonable to expect that he will moderate them. It is one thing to be a maverick[121] as an Associate Justice; quite another to be one as Chief. This is not to say, as Justice Rehnquist discussed in the paragraph above that he will cause the Court to suddenly become harmonious and produce unanimous decisions. It does mean that, rather like Anna and the King of Siam, in the process of "cajoling" the people he may cajole himself as well.

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1. Book Title. The Burger Court: The Counterrevolution that wasn't. (V. Blasi, ed.) (1983).

2. New York Times, June 23, 1986, p. 17.

3. Id. Similarly, Professor Tribe stated that he "would be extremely surprised if over the next several years the effect (of the Rehnquist and Scalia appointments) is not to push the Court to the right considerably." Time Magazine, June 30, 1986, p. 25. The New York Times also averred that "the ideological balance is likely to shift perceptibly to the right if the Senate confirms President Reagan's selections (for the Supreme Court.) June 18, 1986, p. 1.

4. The Burger Court, supra n.1 at 90 (quoting Israel, Criminal Procedure, the Burger Court and the Legacy of the Warren Court. 75 Mich. L.R. 1319, 1408 (1977). See also, Salzburg, The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts, 69 Geo. L.J. 151, 153 (1980):

> The Burger Court has reaffirmed, explicitly or implicitly, nearly all of (the Warren Court criminal procedure) decisions

> .... (T)he difference between the Warren and the Burger decisions tend to be more at the margin than at the heart of the constitutional principles for which the Warren Court is remembered.

5. There are a number of sources to which one may turn for such information. Of greatest value are published speeches/law review articles and sole dissents since these will represent the pure views of their author, undiluted by any need to accommodate the opinions of others and unfiltered by the mind of a reporter of those views. Nearly as useful is the New York Times Magazine interview with the Justice which, while subject to distortion by the reporter, provides insights into personal philosophy which cannot be found in opinions and speeches. Of slightly diminished importance, but still useful are dissenting and concurring opinions authored by Justice Rehnquist that are joined by others. In these, one cannot be totally confident that any given assertion, or reservation, is in truth the pure view of the author or an accommodation to one of the joiners. Obviously this reservation is even more true of majority opinions where the author is more anxious to attract others to join his actual opinion (as opposed to just voting the same way) than is the author of a dissent. Of least use, but not totally valueless, particularly where a consistent pattern has developed over the years, are mere votes to join the majority opinions of others. As I have previously pointed out, the "tyrancy of the majority opinion" is such that it cannot confidently be read as expressing any more than a general preference of the joining justices, rather than their specific views. Bradley, The Uncertainty Principle in the Supreme Court, 1986 Duke L.J., 1, 28 (1986). Nevertheless, it would be difficult for a Justice who has consistently accepted Miranda, for example, by joining a series of opinions that endorsed that decision, to suddenly turn around and decry it. It would be even more difficult for him to attract any supporters to that denunciation. When a Justice joins a concurring or dissenting opinion, it is more likely to express his views since writing a separate dissent is a less significant departure than writing separately from a majority opinion. Since

Justice Rehnquist has not hesitated to write separate dissents, see, e.g., National Law

6. Supra n.4.

7. Illinois v. Gates, 462 U.S. 213 (1983).

8. United States v. Leon, ___ U.S. ___; 104 S.Ct. 3405 (1984).

9. Rakas v. Illinois,439 U.S. 128 (1979). Only a person with a "legitimate expectation of privacy" in a particular premise has standing to raise a Fourth Amendment claim.

10. Stone v. Powell, 429 U.S. 465 (1976).

11. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Journal, June 30, 1986 ("Rehnquist Lone Dissenter in 47 Cases), when he joins a dissent or concurrance in a result, I have tended to ascribe to him acceptance of the author's views, barring better evidence to the contrary.

12. In United States v. Ross, 456 U.S. 798 (1982)

13. United States v. Robinson. 414 U.S. 218 (1973).

14. In New York v. Belton, 453 U.S. 454 (1981).

15. One exception was Franks v. Delaware, 438 U.S. 154 (1978) in which the Court rejected the state's rule that under no circumstances may the defendant challenge the truthfulness of factual statements made in a police affidavit supporting a search warrant.

16. 423 U.S. 411 (1976).

17. Payton v. New York. 445 U.S. 573 (1980).

18. Steagald v. United States, 451 U.S. 204 (1981).

19. Dunaway v. New York, 442 U.S. 200 (1979).

20. 422 U.S. 590 (1975).

21. Id. at . Factors to be considered are "the temporal proximity of the arrest and the confession, the presence of intervening circumstances and, particularly, the purpose and flagracy of the official misconduct are all relevant."

22. 392 U.S. 1 (1968).

23. Ybarra v. Illinois. 444 U.S. 85 (1979).

24. 440 U.S. 648 (1979).

25. 420 U.S. 203 (1975).

26. 384 U.S. 436 (1966).

27. Stone, The Miranda Doctrine in the Burger Court, 1977 S.Ct. Rev. 99, 123.

28. Harris v. New York, 401 U.S. 222 (1971). And in Oregon v. Hass, 420 U.S. 714 (1975) it even allowed the defendant to be impeached with statements given after he was warned and asserted his right to silence, thus providing police with an incentive to ignore the assertion of the Miranda rights.

29. Michigan v. Mosely, 423 U.S. 96 (1975).

30. Michigan v. Tucker, 417 U.S. 433 (1975).

31. This, despite express language in Miranda to the contrary. Miranda held that the warnings are required by the Fifth Amendment "unless we are shown other procedures which are at least as effective in apprising accused persons of their rights." 384 U.S. at 467. See also id. at 476 ("The requirement of warning and waiver of rights is a fundamental with respect to the Fifth Amendment privilege...." See generally, Stone, supra n.27 at 118-19.

32. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).

33. 451 U.S. 477 (1981).

34. 451 U.S. at . In Oregon v. Bradshaw, 462 U.S. 1039 (1983) the Court held that a suspect had "initial(ed) dialogue with the authorities" by asking "what's going to happen to me now?" See also, Smith v. Illinois, 105 S. Ct. 490 (1984) holding that after an Edwards request, the defendant's responses to further reading, or discussion of, the Miranda warnings, "may not be used to cast retrospective doubt on the clarity of the initial request itself."

35. 451 U.S. 454 (1981).

36. 104 S.Ct. 3138 (1984).

37. 430 U.S. 387 (1977).

38. 377 U.S. 201 (1964).

39. In Brewer the police appealed to the defendant's religious feelings in urging him to lead them to the body of his victim so that she could have a "Christian burial." See also United States v. Henry, 447 U.S. 264 (1980) extending Brewer to "deliberate elicitation" of statements, not by police but by a fellow prisoner who was a police plant. But see, Kuhlman v. Wilson. 54 L.W. 4809 (1986) holding that a fellow prisoner who merely hears and reports defendant's statements does not violate Massiah.

40. 104 S.Ct. 2626 (1984).

41. 105 S.Ct. 1285 (1985).

42. 54 L.W. 4265 (1986).

43. 406 U.S. 682 (1972).

44. 388 U.S. 218 (1967). See also _Ash v. United States_, 413 U.S. 300 (1973) holding that right to counsel does not apply to photographic identifications whether conducted before or after the filing of formal charges. See Kamisar, _supra_ n.1 at pp. 68-72 for a detailed criticism of the pretrial identification cases.

45. _Berkemer v. McCarty_, supra n.36, _Gerstein v. Pugh_, supra n.25.

46. "Isn't a discussion of the Warren Court's criminal procedure decisions without mentioning _Miranda_ like staging Hamlet without the ghost." Kamisar, _supra_, n.1 at 66. Kamisar recognizes, id. at 62, that the Burger Court has accepted these seminal decisions of the Warren Court.

47. 322 U.S. 335 (1963).

48. 372 U.S. 353 (1963).

49. 351 U.S. 12 (1956).

50. Such as Griffin v. California, 380 U.S. 609 (1965) forbidding the prosecutor to comment adversely on the defendant's failure to testify and Bruton v. United States, 391 U.S. 123 (1968) upholding the defendant's right to confront adverse witnesses, including co-defendants. See, Tennessee v. Street, 53 L.W. 4528 (1985) in which Justice Rehnquist joined a unanimous opinion reaffirming Bruton but carving out a limited exception to it.

In Carter v. Kentucky, 450 U.S. 288, 309 (1981) Justice Rehnquist did grumble about "the mysterious process of transmogrification by which (the Fifth) Amendment was held to be 'incorporated' and made applicable to the States by the Fourteenth Amendment ...." but his dissent accedes to that development. He disagrees, rather, with the Court's reading Griffin v. California to allow a defendant to insist on a 'no inferences from silence" instruction from the trial judge.

51. 407 U.S. 25, 44 (1972). As Professor Israel has pointed out, the practical impact of the Argersinger decision has been greater than Gideon. Not only are many more cases presented at the misdemeanor level, but there also were many more states that had not been appointing counsel in misdemeanor cases involving jail sentences prior to Argersinger than there were states that had not been appointing counsel in felony cases before Gideon. Israel, supra n.4 at 1337-38.

52. Id. at 46 (op. of Powell, J.).

53. Id. at 47.

54. In Scott v. Illinois, 440 U.S. 367 (1979) the Court, per Justice Rehnquist, limited Argersinger to cases where imprisonment is "actually imposed."

55. 419 U.S. 522, 538 (1975).

56. 391 U.S. 145, 148-49 (1968).

57. 419 U.S. at 540-41. (Emphasis Justice Rehnquist's).

58. Id. at 541. He then argued that the Court's holding that a male defendant was entitled to be tried by a jury from the venire of which women were, in effect, excluded was not "necessary to guard against oppressive or arbitrary law enforcement or to prevent miscarriages of justice and to assure fair trials. Id. at 541.

59. Most notably with Mapp v. Ohio, 367 U.S. 643 (1961) in his dissent from denial of a stay of the mandate of the Supreme Court of California in California v. Minjares, 443 U.S. 916 (1977) (Discussed infra, T.A.N.___). See also United States v. Henry, 447 U.S. 266, (1980)(dissenting opinion of Justice Rehnquist) urging that Massiah v. United States, 377 U.S. 201 (1964) be reexamined.

60. Estelle v. Williams, 425 U.S. 501 (1976). However, the majority further held that this claim was negated by failure of counsel to object. Justice Brennan and Marshall disagreed with this latter point.

61. Geders v. United States, 425 U.S. 80 (1976). See also, Strickland v. Wash., 52 L.W. 4565 (1984) in which Justice Rehnquist agreed that the issue of ineffective assistance of counsel should be available to defendants on federal habeas corpus.

62. 441 U.S. 130 (1979). To be sure, Burch merely stopped the progression of earlier cases in which the jury trial rights of defendants had been constructed, Williams v. Florida, 399 U.S. 78 (1970) (6 person jury O.K.) Apoduca v. Oregon, 406 U.S. 406 U.S. . 404 (1972) (Non-unanimous guilty verdicts O.K.).

63. 440 U.S. 450 (1979). Justice Blackmun's dissent was based on jurisdictional grounds.

64. 437 U.S. 1 (1978). See also, Hudson v. Louisiana, 450 U.S. 40 (1981) (unanimous opinion. But see, Tibbs v. Florida, 457 U.S. 31 (1982) in which Justice Rehnquist joined a 5-4 opinion which weakened Burks by holding that reversal of the defendant's conviction based on the weight, rather than the sufficiency, of the evidence does not bar retrial, a distinction that I find unconvincing.

65. 425 U.S. 94 (1976). Justice Stevens, joined by Justice Stewart concurred in the opinion but made it clear that certain of the prosecutor's notes were exempt from disclosure. 425 U.S. at 112-116.

Justice Powell, joined by the Chief Justice concurred in the result but disagreed with the majority as to what prosecutorial notes were appropriate for disclosure. 425 U.S. at 116-129.

66. 54 L.W. 4598 (1986).

67. Thus, I disagree with the assessment of Professor Shapiro, rendered in 1976 that, at least in the area of trial rights, Justice Rehnquist's guiding philosophy is that "conflicts between an individual and the government should, whenever possible, be resolved against the individual. Shapiro, Mr. Justice Rehnquist: Preliminary View, 90 Harv. L.R. 293, 294 (1976).

68. 462 U.S. 213, (1983).

69. 384 U.S. 436 (1966).

70. 377 U.S. 201 (1964).

71. In his dissenting opinion in United States v. Henry, 447 U.S. 264, ___ (1980). See also, Salzburg, supra n.___ at 206-08 criticizing Massiah's "doctrinal emptiness."

72. 446 U.S. 291 (1980).

73. Id. at ___.

74. Is supra n.___ at

75. 417 U.S. 433.

76. Stone, "The Miranda Doctrine in the Burger Court," 1977 Sup. Ct. Rev. 99, 123.

77. 426 U.S. 610 (1976).

78. 420 U.S. 714 (1975).

79. 423 U.S. 96 (1975).

80. 54 L.W. 4077 (1986).

81. However, he disagreed that the defendant's request for counsel could not be so used. "While silence may be "insolubly ambiguous," as Doyle held, "a request for a lawyer may be highly relevant where the plea is based on insanity." 54 L.W. at 4080 (dissenting opinion of Rehnquist, J. joined by Burger, C.J.).

82. 451 U.S. 477 (1981).

83. Id. at 490. However, Powell and Rehnquist did not agree that a defendant could only be further interrogated if he "initiated further conversation." Rather the question should have been "whether there was a free and knowing waiver of counsel before interrogation commenced." Id. at 491.

84. 104 S.Ct. 3138 (1984).

85. Id. at ___.

86. Robbins v. California, 453 U.S. 420, 437 (1981)(dissenting opinion). For a fuller exposition of Justice Rehnquist's opposition to the exclusionary rule see, California v. Minjares, 443 U.S. 916 (1979)(Dissenting from denial of stay)(Joined by Chief Justice Burger.)

87. See, Burger, Who Will Watch the Watchman. 14 Am. Univ. L.R. 1, 10 (1964).

88. 367 U.S 643, (1961).

89. See, e.g., Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence, 62 Judicature 214 (1979) and sources cited therein. For the opposite position see, e.g., Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment? 62 Judicature 66 (1979) and sources cited therein.

90. See generally, Mirjares, supra, n.75 at 927.

91. 414 U.S. 218 (1973).

92. Other significant opinions written by Justice Rehnquist which take a relatively narrow view of what constitutes a Fourth Amendment violation are Illinois v. Gates, 462 U.S. 213 (1983) in which the definition of probable cause is broadened, and Adams v. Williams, 407 U.S. 143 (1972) in which a "fristk" was allowed despite the fact that the policeman who performed it had seen no illegal activity (he had been "tipped" by "a person known" to him).

93. 440 U.S. 648 (1979). Justice Rehnquist accepted the Court's holding to the extent that it forbade police from stopping vehicles without cause for criminal investigatory purposes but felt that random stops for license and registration checks were appropriate. Id. at 665.

94. 442 U.S. 200 (1979) (Powell, J., took no part in the decision.)

95. Id. at 221. Justice Rehnquist further argued that, even if there was a Fourth Amendment seizure here, the Constitution did not require suppression of the defendant's statements, given after receipt of Miranda warnings. Id. at 225-27.

96. 439 U.S. 128 (1978).

97. 428 U.S. 465 (1976).

98. 446 U.S. 620 (1980). Walder v. United States, 347 U.S. 62 (1954) had previously held that a defendant's direct testimony could be impeached with illegally seized evidence.

99. 438 U.S. 154 (1978). Justice Rehnquist, joined by the Chief Justice, dissented, arguing that "if the function of the warrant requirement is to obtain the determination of a neutral magistrate as to whether sufficient grounds have been urged to support the issuance of a warrant, that function is fulfilled at the time the magistrate concludes that the requirement has been met." Id. at ___. While it is not the purpose of this article to criticize Justice Rehnquist's positions, but rather to

summarize them, I cannot resist dissenting from this view. A magistrate who has been lied to by the police is simply not "neutral" in any meaningful sense. To not allow the defendant to challenge the veracity of the warrant affidavit would be to seriously weaken the warrant requirement.

100. 422 U.S. 531 (1975).

101. 413 U.S. 266 (1973). Sanchez held that warrantless roving patrol searches for illegal aliens were unconstitutional in the absence of a warrant.

102. Finally, even if the Fourth Amendment violation and defendant's capacity to raise it are conceded, the Court may find the error harmless. However, while Justice Rehnquist has written harmless error opinions in cases involving error at trial, Del. v. Van Arsdall, 54 L.W. 4347 (1986) and in the grand jury, U.S. v. Mechanik, 54 L.W. 4167 (1980) to date the only case to find a Fourth Amendment violation harmless, Chambers v. Maroney, 399 U.S. 42 (1970) did so without discussion and before Justice Rehnquist joined the Court.

103. 442 U.S. 319 (1979).

104. 443 U.S. 47 (1979).

105. 437 U.S. 385, 405 (1978). Justice Rehnquist dissented from the majority opinion on the separate issue of the admissibility of certain statements made by the defendant.

106. 54 L.W. 4396 (1986).

107. Id. at 4397. Also, in Haring v. Prosise, 51 L.W. 4736 (1983) Justice Rehnquist, consistently with his view that there should be other remedies than evidentiary exclusion for Fourth Amendment violations, joined a unanimous Court in allowing a defendant who plead guilty to pursue a search and seizure, 42 U.S.C. § 1983 action against the police based on an alleged illegal search and seizure.

108. 105 S.Ct. 1643 (1985).

109. However, Justice Brennan and Marshall concurred only in the result because the majority further offered the dictum that on-site fingerprinting of the suspect would have been OK. 105 S.Ct. at ___.

110. 420 U.S. 103 (1975). However, four Justices refused to join that portion of the Court's opinion that held that the question of probable cause to hold the defendant can be determined without an adversary hearing. 420 U.S. at ___ (opinion of Stewart, J.)

111. Rehnquist, "Is an Expanded Right of Privacy Consistent With Fair and Effective Law Enforcement," 23 Kans. L.R. 1 (1974).

112. Id. at 21. In that same speech, Justice Rehnquist noted his agreement with Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974) in which the court ordered the expungement of the arrest record of a suspect who had been wrongly arrested and never charged from the FBI's criminal (but not identification) files. Id. at 6-8.

113. Id. at 22.

114. Mincey v. Arizona, 437 U.S. 385, 406 (1978) (Opinion of Rehnquist, J.) quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

115. In an interview with the New York Times Magazine he expressed the view that:

> (A)t the time I came on the Court the boat was kind of keeling over in one direction.... I felt that my job was to ... to kind of lean the other way.
> New York Times Magazine, March 3, 1985.

116. New York Times Magazine, supra at 34.

117. Id. at 35.

118. Id. at 31.

119. Id. at 101.

120. 3 Hastings Con. Law. Q. 637 (1976). Justice Rehnquist also described how he believed the Chief should run the conference:

> By virtue of his own preparation and economy of statement, Charles Evans Hughes presided magisterially and yet without offending the brethren. Stone, on the other hand, though an extraordinarily able lawyer and excellent writer of opinions, had less sensitivity for the different kinds of responsibilities associated with presiding over the conference. If the chief justice

> conceives his role to be akin to that of the presiding officer at a political convention, who can always grab the microphone away from the opposition when necessary, he will create resentment without actually advancing the cause that he champions. Justice Cardozo has written that "the sovereign virtue for the judge is clearness," and most members of the profession would agree with him. The chief justice has a notable advantage over his brethren: he states the case first, and analyzes the law governing it first. If he cannot, with this advantage, maximize the impact of his views, subsequent interruptions of colleagues or digressions on his part or by others will not succeed either. Theodore Roosevelt described the presidency as a "bully pulpit." The chief justice, as president of the conference, occupies no such position.

Id. at 647.

121. Anthony Lewis described Justice Rehnquist as "a loner," "out at the edge of the Court." New York Times, supra n.2. It is true that particularly in his early years he authored a number of sole dissents, see, National Law Journal, June 30, 1986, pp. 48-49. "Rehnquist Lone Dissenter in 47 Cases." Still, 47 sole dissents out of about 2100 decisions in which Justice Rehnquist has participated in 14 years is not exactly an overwhelming statistic. More significant, in my view, is how often a Justice dissents overall. In the last two years for which statistics are available (October Terms 1983 and 1984, Justice Rehnquist has dissented an average (mean) of 31.5 times out of about 150 opinions. This is close to the Court's average of 31.8 and substantially less than the average of Justice Brennan (58.5),

Marshall (55.5) and Stevens (52). "The Supreme Court, 1983 Term," 98 Harvard L.R. 307 (1984); "The Supreme Court, 1984 Term," 99 Harvard L.R. 322 (1985). This is hardly the record of a "loner out at the edge of the Court."

The Chairman. thank you very much.

The distinguised Senator from Delaware.

Senator Biden. I would be proud to have you two fellows speaking up for me like that. I thought you were both eloquent.

Dr. Freedman. Thank you.

Mr. Bradley. Thank you.

Senator Biden. And, Mr. President—I do not often get to speak to presidents these days—you write so well. Have you thought of writing speeches in any Iowa primary caucus campaigns? [Laughter.] I am serious. You are both eloquent, and he should be very, very flattered to have men of your caliber say the things you said.

Dr. Freedman. Thank you, Senator.

Mr. Bradley. Thank you, Senator.

The Chairman. The distinguished Senator from Iowa.

Senator Grassley. Thank you, Mr. Chairman.

First of all, I would say, President Freedman, we are proud to have you as president of our university, and particularly from your outstanding deanship at the University of Pennsylvania Law School.

Senator Biden. He got his training in the East. [Laughter.]

Senator Grassley. I do have some questions, but first of all, Dr. Freedman, am I right that you served as a law clerk for Justice Thurgood Marshall when he was on the Second Circuit Court of Appeals?

Dr. Freedman. Yes, Senator, that is correct.

Senator Grassley. And we know Justice Thurgood Marshall to be one of the more liberal members of the Supreme Court. So I would like to ask, in your service to Justice Marshall, did you find him to be a fair man who treated people in an equal manner regardless of race or gender?

Dr. Freedman. Absolutely fair.

Senator Grassley. You detailed how you have also served with Justice Rehnquist on that faculty of the seminar in American Law. You were able closely to observe Justice Rehnquist's interaction with men and women of many nationalities in this function, is that not true? I think you partly described that.

Dr. Freedman. Yes, it is true, Senator.

Senator Grassley. From your observations, how did Justice Rehnquist treat others, both students and faculty members?

Dr. Freedman. Justice Rehnquist treated everyone equally. A student could have been from the Middle East. The student could have been from the Eastern Bloc. The student could have been from Western Europe. None of that mattered to Justice Rehnquist. He related to them on a one-to-one human basis.

Senator Grassley. Was there any indication whatsoever that Justice Rehnquist treated people of other nationalities or women in an unequal or unfair manner?

Dr. Freedman. No, sir.

Senator Grassley. In your observations, did Justice Rehnquist treat others any less fairly than Justice Marshall did?

Dr. Freedman. No, sir.

Senator Grassley. I guess this next question I would also ask Professor Bradley to comment on. Supreme Court Justices assist in legal education by speaking and participating in workshops at universities throughout the country.

In your opinion as a university president and former law school dean, Dr. Freedman, and in your case, Professor Bradley, how would Justice Rehnquist add to the legal education of present and future lawyers?

Dr. **Freedman**. Justice Rehnquist has been notable in his willingness to devote time to law students. Many of the speeches which were the subject of examination these last two days were originally delivered at law schools to audiences of law students. He has been conscientious in doing his share of judging moot court arguments which is one of the greatest thrills a law student can have to appear before a justice of the Supreme Court, and I would fully expect that as Chief Justice, within the limits of his schedule, he would continue to do that.

I know that he is deeply concerned with the quality of legal education, and I would expect that to be one of the concerns that he carries forward from Chief Justice Burger.

Senator **Grassley**. Professor Bradley, maybe from a little different standpoint, if you would see a Chief Justice serving that role, would you have any comment on Justice Rehnquist's contribution?

Mr. **Bradley**. Yes, Senator. In the first place, I did assist Justice Rehnquist when I was clerking in preparing some remarks that he was to give at law schools, specificially the University of Texas as one that I recall. I was rather amazed at the amount of effort that he put into it, given his busy schedule.

I would simply add in addition to that that he has already graciously agreed to come to Indiana University Law School in September to dedicate our newly renovated law school building. So he obviously intends to continue in this vein whether he is Chief Justice or still an Associate Justice.

Senator **Grassley**. I thank both of you for answering my specific questions.

Mr. Chairman, I have no more questions.

The **Chairman**. Thank you very much.

I just want to say to you, Dr. Freedman, you can be very proud of the member of this committee who has just been asking those questions, the Senator from Iowa.

Dr. **Freedman**. We are, Senator. Thank you very much.

The **Chairman**. We are proud to have him on the committee. He is making a very remarkable record here.

The distinquished Senator from Arizona.

Senator **DeConcini**. Mr. Chairman, I do not have any questions.

The **Chairman**. The distinguished Senator from Illinios.

Senator **Simon**. I have no questions, Mr. Chairman.

The **Chairman**. I want to thank you gentlemen very much for your appearance here and we appreciate your testimony.

[Prepared statement follows:]

TESTIMONY OF JAMES O. FREEDMAN

My name is James O. Freedman and I have been President of the University of Iowa since 1982. Before that, I served for eighteen years as a Professor of Law at the University of Pennsylvania Law School, having been Dean of the Law School from 1979 to 1982.

I am grateful for the opportunity to appear before this Committee to express my high regard for Justice William H. Rehnquist. Because it is now more than four years since I left the ranks of legal scholars in order to become an educational administrator, I will not speak, as so many others will, to Justice Rehnquist's career on the Supreme Court of the United States. Instead, I will direct my remarks to Justice Rehnquist's character, integrity, and intellectual ability.

My association with Justice Rehnquist dates back exactly seven years, to July 1979, when we served together on the five-member faculty of the Salzburg Seminar in American Studies. The Salzburg Seminar was founded in 1947 by a group of idealistic young Americans for the purpose of providing a European forum for the exploration of significant aspects of American society. Every summer it holds a three-week session on American law and legal institutions at Schloss Leopoldskron, the former home of Max Reinhardt, in Salzburg, Austria. The student body is composed of approximately fifty lawyers -- practitioners, judges, civil servants, professors, and corporate counsel -- from the nations of Western Europe, Eastern Europe, and the Middle East.

During those three weeks in July 1979, I had the opportunity to attend Justice Rehnquist's lectures on American constitutional law, to join him in teaching a seminar on certain aspects of the American criminal justice system, and to be with him daily, in the classroom, in the dining hall, and at social occasions. This experience left me deeply impressed by the depth of his intellect and the strength of his character.

In the classroom, Justice Rehnquist's lectures were a model of conscientious preparation and scholarly self-discipline. They were fair, balanced, appropriately skeptical of much conventional wisdom, and creative in their assessment of the relationship between the growth of American law and the development of American political and social institutions. They bore the mark of a powerful mind and a spacious imagination governed by standards that will not tolerate shallowness of thought or shoddiness of generalization.

As Justice Rehnquist outlined the historical development of American law in the Nineteenth Century, he explored the distinctive interplay of such aspects of the American experience as the intellectual heritage of the common law, the Westward Movement, the growth of economic enterprise, the industrialization of cities, the rise of the railroads, and the pressure of sectional interests. He described how American judges, lawyers, political officials, and citizens sought to create a body of law out of what Perry Miller has called a "confused and confusing complex of emotions, traditions, and aspirations."

He regarded the growth of the law in the Nineteenth Century as an essential episode in the history of the American mind. And he conveyed the general temper of the times, the anguished hopes and optimistic efforts of a new nation to govern itself effectively and justly, with an admirable intellectual elegance and precision.

If the fifty students attending the Salzburg Seminar in July 1979 had expected a Justice of the United States Supreme Court to be distant, forbidding, or chilly in his personal relationships, they were soon disabused of that stereotype. For all the stature and prestige of his position, Justice Rehnquist was genuinely approachable. He was a humane and decent presence in the classroom, in the dining hall, and in the after-dinner coffee conversations. He conveyed to the students an authentic interest, warmth, and modesty.

Those who bear the heavy responsibilities of judicial office frequently find that their entire being is consumed by their public self. Justice Rehnquist is one of those unusual public figures who has recognized the importance of cultivating a private self dedicated to the development of his powers of creativity, of humane understanding, and of cultural appreciation. The fact that he continues to read and write as extensively as he does, and that he has recently taken to learning to paint, suggests the importance he properly attaches to the cultivation of a private self. Judges who preserve a private self -- a harbor from the turbulence of public life -- renew themselves by reflection and contemplation in ways that enrich the contributions they make by their public service.

William H. Rehnquist is a person of rare qualities of mind and character, qualities that will bring distinction to the office of Chief Justice of the United States. They are qualities the Nation should cherish in the Chief Justice of a Court with the ultimate responsibility for administering those wise restraints that make us free.

The CHAIRMAN. Now, the next panel is No. 4: Ms. Eleanor Smeal, National Organization for Women; Ms. Althea Simmons, NAACP; Ms. Judith L. Litchman, executive director, Women's Legal Defense Fund; Ms. Elaine Jones, associate legal counsel, Legal Defense Fund; and Mr. Benjamin Hooks, chairman of the Leadership Conference on Civil Rights.

Senator Biden I believe has asked these to come in tomorrow out of the 4 hours allotted to the minority. And so we will excuse them now and have them come tomorrow.

Panel No. 5: I will ask them to come around, please. Mr. Jack Clayton, Christian Legal Defense Foundation. Is he here? I do not believe he is here. Mr. Gerald Gilbert, president, Federal Bar Association. Mr. Gerald Ringer, Family Research Council of America. Mr. Bruce Fein, United Families Foundation. Mr. McCotter, Americans for Biblical Government.

Mr. Fein, I believe you are the only one here. If you will hold up your hand and be sworn.

Will the testimony you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

Mr. FEIN. Yes.

The CHAIRMAN. Have a seat. Now the others who are not here will have the privilege of putting their statements in the record.

TESTIMONY OF BRUCE FEIN, UNITED FAMILIES FOUNDATION, WASHINGTON, DC

The CHAIRMAN. Mr. Fein, you may go ahead and make a statement here of 3 minutes.

Mr. FEIN. Thank you. My name is Bruce Fein, and I am speaking on behalf of United Families of America. United Families strongly supports President Reagan's nomination of Associate Justice William Rehnquist to be Chief Justice of the United States.

The nomination is a fitting occasion for examining the proper role of the Supreme Court in expounding the Constitution. Next year marks the bicentennial of the Constitution and its profound political wisdom that has enabled our Nation to grow and prosper.

The original Constitution provided a mechanism to alter its mandates consistent with the norm of self government, namely, by constitutional amendment. The Bill of Rights, the Civil War Amendments, the amendments prohibiting discrimination in the franchise based gender or age all testify to the capacity of the people to change the Constitution to accord with perceived contemporary needs.

The U.S. Supreme Court was not envisioned by our Founding Fathers as empowered to effectuate changes in the policies of the Constitution through creative interpretation. That was the major reason why Alexander Hamilton characterized the Federal judiciary as the least dangerous branch of government.

If the electorate is not to lose control over its destiny, it must be alert to the interpretive doctrines employed by Justices of the Supreme Court in addressing constitutional questions.

The contemporary Supreme Court is routinely asked to decide issues concerning abortion, church-state relations, reapportionment, liable of public officials, affirmative action, and discrimination on the basis of gender or handicap with enormous consequences for national public policy.

If the Justices are not constrained by the intent of our constitutional architects in deciding cases involving these issues, then they may transform our Constitution without popular approval as is required in the amendment process.

James Madison, the Father of the Constitution, lectured that if the sense in which the Constitution was accepted and ratified by the Nation be not the guide in expounding it there can be no security for a faithful exercise of its powers.

And Thomas Jefferson warned that our peculiar security is in the possession of a written Constitution. "Let us not make it a blank paper by construction," he stated. Experience testifies to the wisdom of Madison and Jefferson.

When original intent has been rejected by the Supreme Court as the foundation for constitutional interpretation, the Nation has suffered and our ideals of self-government have been mocked.

One thinks, for example, of Supreme Court decisions denouncing child labor laws. Justice Rehnquist deserves applause for his devotion to our constitutional aspirations and deep understanding of the judiciaries constitutional role.

His 14 years on the Supreme Court glitter with both erudition and general attachment to the intent of our Founding Fathers. At time, Justice Rehnquist has spoken in lonely dissent, but Justice Harlan was the sole dissenter from the odious separate but equal doctrine embrassed in Plessy against Ferguson, and Chief Justice Stone was the sole objector to the decision upholding a compulsory flag salute for Jehovah's Witnesses attending public schools in Minersville School District against Gobitis.

Both the Harlan and Stone dissents later became the law of the land when a majority of the Supreme Court accepted their views. United Families of America urges the Senate to confirm Associate Justice William Rehnquist as Chief Justice of the United States. Thank you, Mr. Chairman.

[Statement follows:].

TESTIMONY OF BRUCE FEIN
ON BEHALF OF UNITED FAMILIES OF AMERICA

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

IN SUPPORT OF ASSOCIATE JUSTICE WILLIAM REHNQUIST
NOMINATED AS CHIEF JUSTICE OF THE UNITED STATES

Mr. Chairman and members of the committee,

My name is Bruce Fein and I am speaking on behalf of United Families of America. United Families of America strongly supports President Reagan's nomination of Associate Justice William Rehnquist to be Chief Justice of the United States.

The nomination is a fitting occasion for examining the proper role of the Supreme Court in expounding the Constitution. Next year marks the bicentennial of the Constitution, and its profound political wisdom that has enabled our Nation to grow and prosper. Despite some initial flaws, the original Constitution provided a mechanism to alter its mandates consistent with the norm of self-government: namely, by constitutional amendment. The Bill of Rights, the Civil War Amendments, the Amendments prohibiting discrimination in the franchise based on gender or age all testify to the capacity of the people to change the Constitution to accord with perceived contemporary needs. The United States Supreme Court [in other words] was not envisioned by our Founding Fathers as empowered to effectuate changes in the policies of the Constitution through creative interpretation. That was a major reason why Alexander Hamilton characterized the federal judiciary as the "least dangerous branch" of government.

If the electorate is not to lose control over its destiny, it must be alert to the interpretive doctrines employed by Justices of the Supreme Court in addressing constitutional questions. As Alexis de Tocqueville presciently observed, "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one." Thus, the contemporary Supreme Court is routinely asked to decide questions concerning abortion, Church-State relations, reapportionment, libel of public officials, affirmative action, and discrimination on the basis of gender or handicap with enormous consequences for national public policy. If Justices on the Supreme Court are not constrained by the intent of our constitutional architects in deciding cases involving these issues, then they may transform our Constitution without popular approval, as is required in the amendment process.

James Madison, the father of the Constitution, lectured that if "the sense in which the Constitution was accepted and ratified by the Nation...be not the guide in expounding it, there can be no security...for a faithful exercise of its powers." And venerated Thomas Jefferson warned that "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction..." Experience testifies to the wisdom of Madison and Jefferson. When original intent has been rejected by the Supreme Court as the foundation for constitutional interpretation, the Nation has suffered and our ideals of self-government have been mocked. One thinks, for example, of Supreme Court decisions denouncing child labor laws.

Justice Rehnquist deserves applause for his devotion to our constitutional aspirations and deep understanding of the judiciary's constitutional role. His fourteen years on the Supreme Court glitter with both erudition and general attachment to the intent of our Founding Fathers. At times, Justice Rehnquist has spoken in lonely dissent. But Justice Harlan was the sole dissenter from the odious separate-but-equal doctrine embraced in Plessy v. Ferguson. And Chief Justice Stone was the sole objector to the decision upholding a compulsory flag salute for Jehovah's Witnesses attending public schools in Minersville School District v. Gobitis. Both the Harlan and Stone dissents later became the law of the land when a majority of the Supreme Court accepted their views.

Justice Rehnquist, we believe, like the esteemed Judge Learned Hand, rejects the idea that judges should play the role of Platonic Guardians in governing the country. His judicial record is spotless. United Families of America urges the Senate to confirm Associate Justice William Rehnquist as Chief Justice of the United States.

Senator BIDEN. Mr. Fein, I am glad to meet you. I watched you on television one night. I think you are a very bright guy. I think you are dead wrong, but I think you are very bright, I really do. I am not kidding. I was impressed. I was truly impressed with you.

Let me ask you: Do you think Justice Rehnquist's record reflects a Justice who in fact subscribes to your definition of original intent?

Mr. FEIN. I think the answer is largely yes. On the other hand, one recognizes that a Justice on the Supreme Court, unlike someone who maybe sits like me as a commentator, is dealing in a collegial body that is bound by a host of precedents that may not exactly reflect one's own interpretation.

Senator BIDEN. Why is he bound by any precedent?

Mr. FEIN. Simply because there is a need for stability and predictability in the law that at times outweighs one's desire simply to fashion as though one was writing tabula rasa.

Those institutional concerns do not bind someone who is simply a commentator, a critic, or someone who praises a particular decision of the Court.

Senator BIDEN. Knowing and having read Justice Rehnquist's writings, as we both have, do you think in fact that is the reason Justice Rehnquist has signed on to a number of the decisions confirming—decisions such as *Baker* v. *Carr,* decisions relating to the child labor laws to which you referred to? Do you think that is the only reason he has signed on?

Mr. FEIN. Well, he was not there, as he explained earlier, to author those opinions when *Baker* v. *Carr* was decided in 1962.

Senator BIDEN. No, but what he pointed out was there are follow-on cases that relate to those principles. In order to reach the conclusion he reached in those other cases, he had to accept the proposition that his tack was the majority position taken in both those cases.

Do you think he has accepted that as a consequence of his desire to be collegial or because he believes it, based on having read what he has written?

Mr. FEIN. I think it is somewhat in between those two alternatives.

Senator BIDEN. So do I.

Mr. FEIN. I think there is a need for predictability in the law. You cannot have a system function if on every occasion when an issue arises the Court is going to go back and re-examine every precedent since 1789. I think in many cases if he were sitting and the issue was to be decided without any past history, he would not have agreed with many of those Warren Court decisions.

Senator BIDEN. The Justice Department is probably in an apoplexy with your testimony, but I think you are being honest and I agree with your interpretation, both of what original intent means and what Justice Rehnquist's instincts are.

Well, my time is up. By the way, I would love you to come by my office sometime, seriously. I am serious. I invite you to come by because I would love to discuss these issues with you and convert you.

Mr. FEIN. I will accept the invitation, Senator.

The CHAIRMAN. He is a good talker. He might persuade you.

Senator BIDEN. He is a good talker. I have listened. He is extremely bright, and unlike many of the conservatives on the right—and I am not being smart, Mr. Chairman. Unlike many conservative commentators, he knows his facts and he is consistent and he is honest, and he is consistently wrong.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator BIDEN. He is really good.

Senator DECONCINI. In assessing Judge Rehnquist, your support for Justice Rehnquist as a Chief Justice, what was the number one criteria that you decided met what you thought was needed for this position?

Mr. FEIN. I think what is most important is constitutional philosophy as a bedrock foundation. There are other components of Rehnquist's background that I think commend himself for confirmation.

For example, his collegiality, his recognition that working in a body where he is not the sole decider and working in an institution where there is a need for predictability, for a so-called massing the Court. That's a term that Chief Justice William Howard Taft used. That he would be an excellent Chief not only in terms of his own understanding of the constitutional role of the Court, but also on recognizing the limits of one person, even as a Chief, to have his way on every occasion and thereby at times working to obtain a consensus that is very much needed to have a predictability in the law which has really been lacking over the last decade.

Senator DECONCINI. Mr. Fein, do I take it, then, from that answer that, in your opinion, the number one criteria to be a Supreme Court Chief Justice is a philosophical approach that you represent and that you feel that Justice Rehnquist represents?

Mr. FEIN. Yes, and I think that would really be true for all of the Justices, for the Associate Justices as well. Consensus-building is more important for the Chief than it is for an Associate Justice.

Senator DECONCINI. I take it from that that you put the philosophy above experience, ability to write, past performance in the profession.

A hypothetical, if you had someone of the philosophy of Justice Rehnquist, or yourself, who had never served on the bench, and yet you had an experienced jurist, say, of 15 years who did not meet that philosophical test, you would decide with the one that had the philosophical bent that you subscribe to versus the one that had the experience. Is that correct?

Mr. FEIN. Yes, I would. However, I would add that I would not believe that the one I did not give first approval to would be unqualified to serve on the Supreme Court. It is simply that in my estimation, in evaluating the important role of the Supreme Court and where the evolution of jurisprudence is likely to lead in an enlightened fashion or retrogressive from a particular perspective, that philosophy would be more important in my judgment.

Senator DECONCINI. What is Justice White or Justice Brennan or Justice Stevens or somebody like that, or Justice Marshall, had been nominated for Chief Justice? Would you rule them out because of their philosophical difference?

Mr. FEIN. I would not rule them out as being unqualified.

Senator **DeConcini**. Would you support them if they had been nominated?

Mr. **Fein**. No, I would not have enthusiastically supported them.

On the other hand, I would testify that they were qualified to become Chief Justice of the United States. That is a different criteria than, say, well, I am enthusiastic that they have received the appointment.

Senator **DeConcini**. I agree. But you would not think that they should not be seated as Chief Justice.

Mr. **Fein**. That is correct.

Senator **DeConcini**. Thank you. Thank you, Mr. Chairman.

The **Chairman**. The distinguished Senator from Illinois.

Senator **Simon**. One question. You know where Senator Biden comes from philosophically. You know where Paul Simon comes from philosophically. If you were a member of the Senate Judiciary Committee and you were of our political philosophy rather than yours, would you vote to confirm Justice Rehnquist or would you not?

Mr. **Fein**. I would vote to confirm the nomination of William Rehnquist. But I would like to briefly enlarge on a major reason for that conclusion.

From my examination of the role of the Senate in the confirmation process, as understood by Hamilton in the Federalist Papers and in examining the evolution of the appointments power, it seems to me that there was a deliberate effort to fasten on one individual accountability for choosing a particular nominee for the Supreme Court with a particular philosophy. And therefore, as Hamilton explained in the Federalist Papers, he envisioned rejection of nominees on the basis of cronyism, on the basis of corruption, or incompetence. He did not envision the Senate in the confirmation role as trying to screen out nominees on the basis of philosophy.

And in light of the importance that I think needs to be given to holding a President accountable for his nominees and how they fashion jurisprudence, it is important for the Senate to be very reserved in seeking to reject a candidate for the Supreme Court simply because of a philosophical disagreement with the President.

Senator **Simon**. So you would disagree with Justice Rehnquist's article in the Harvard Law Record back in 1959 in which he says we ought to examine that very, very carefully.

Mr. **Fein**. Well, I am not so sure I would disagree in this sense, Mr. Senator: That I think it is important that during the conformation proceedings, there is aggressive questioning so that the candidate's philosophy is known to all the people. Otherwise, there is not an ability to fasten accountability on the President if a nomination comes up and he is quickly confirmed, and there is not a full and complete exploration of what his philosophical views are. So I am in total agreement that it is very important to illuminate and to inform the American public through questions as to what a candidate's philosophy is. But that is a different function than deciding when it comes to voting to approve or disapprove a candidate to use a philosophical test.

Senator SIMON. One other thing. After you meet with Joe Biden, let me know whether you convert him or he converts you. Thank you, Mr. Fein.

Senator BIDEN. Mr. Chairman, before you release this witness, I know we are going really rapidly, so I cannot help but just to ask two more questions.

You believe that the function of the Senate is to illuminate but that illumination should not shed any light on how we vote.

Mr. FEIN. I am saying that illumination is not necessarily congruent with the considerations that affect your vote. It is what Woodrow Wilson referred to as the informing function of Congress.

Senator BIDEN. I understand.

Mr. FEIN. Which he thought was its most important function.

Senator BIDEN. In fact, you are aware of the debate that Hamilton's point of view was in the minority, are you not, at the time of the Federalist Papers? He did in fact write——

Mr. FEIN. Hamilton authored the Federalist Papers.

Senator BIDEN. I know. He authored the Federalist Papers, but you are aware of that his view—not in the Federalist Papers—but his view at the time was a minority view? You are aware of that. The Constitution debates took place in 1787. You are aware that in fact he was outvoted?

Mr. FEIN. Yes, I think you are referring to a different issue. Hamilton had proposed——

Senator BIDEN. The role of the Senate.

Mr. FEIN [continuing]. An exceedingly strong executive in the Constitutional Convention which was not accepted.

Senator BIDEN. He also proposed, along with others, and was outvoted on two occasions. He also proposed that in fact the President be the one to not only propose, but to dispose of who the nominee to the Court should be in the appointment power.

He in fact was, in the Virginia plan, clearly his view was not the majority view. But without delaying, let me ask you one other question. You were telling me that if Justice Brennan were picked by this President—well, if Justice Brennan were picked by this President, rabbits would be dogs. It is not likely.

But if Justice Brennan were picked by——

Mr. FEIN. Remember, Earl Warren was picked by Dwight Eisenhower.

Senator BIDEN. Yes, but he did not know any better, and everybody knows Justice Brennan.

If Senator DeConcini is elected President in 1988, he is sure to pick me as his Attorney General. And if that occurs and I recommend to him Brennan and, God forbid, something happens to Rehnquist, he resigns; do you mean to tell me you would be here testifying on behalf of and suggesting we vote for Brennan to be Chief Justice.

Senator DECONCINI. That is what he said.

Senator BIDEN. I want to hear him say it again.

Mr. FEIN. What I said was that I would testify that he was qualified to be Chief Justice of the United States. Yes, I would.

Senator BIDEN. Is that different than supporting him for Chief Justice?

Mr. **Fein**. I think it is. I think one can say one is qualified for an office but not be an enthusiastic supporter of that particular candidate.

Senator **Biden**. Now you are sounding like a politician, but thank you.

Mr. **Fein**. I think you recognize that distinction all the time. You may vote to confirm someone to be Secretary of State because you think they are qualified. You may not be an enthusiastic supporter of them, but you think that an appropriate decision that someone has to make.

Senator **Biden**. Good. I look forward to seeing you. I really do.

The **Chairman**. I want to thank you very much. You have proved to be very articulate, and we appreciate your presence.

Mr. **Fein**. Thank you, Mr. Chairman and the committee.

The **Chairman**. Now, panel 6 is Ms. Estelle Rogers, N.O.W. Legal Defense and Education Fund; Ms. Susan Nicholas, Women's Law Project; Ms. Nancy Broff, Judicial Selection Project; Ms. Irene Natividad, national chair, National Women's Political Caucus. The distinguished ranking member has asked that these be heard tomorrow so we will carry that panel over.

The next panel is panel No. 7, and I will ask them to come around. Ms. Barbara Dudley, executive director, National Lawyers Guild; Mr. William Kunstler, Center for Constitutional Rights; Ms. Nancy Ross, executive director, Rainbow Lobby; Mr. Dennis Balske, legal director of The Southern Poverty Center; and Ms. Beverly Treumann, executive director, NICA—Nuevo Instituto de Centro-America.

Mr. Kunstler is the only one here.

Senator **Biden**. Let the record show that they are not waving to one another.

The **Chairman**. Do you swear that the testimony that you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Kunstler**. I do.

The **Chairman**. I want to announce that the other members—Ms. Dudley or Ms. Ross or Mr. Balske or Ms. Treuman—if they care to place statements in the record, we will be glad to have them do so.

TESTIMONY OF WILLIAM KUNSTLER, CENTER FOR CONSTITUTIONAL RIGHTS, NEW YORK, NY

Mr. **Kunstler**. May I proceed, Mr. Chairman?

The **Chairman**. You may proceed, for 3 minutes.

Mr. **Kunstler**. Mr. Chairman, my statement I have already submitted for the record, and I am not going to repeat. I am going to break up the cascade of plaudits that have come, as you probably expected.

I am a founder and vice president of the Center for Constitutional Rights in New York City, and without belaboring the point, its 20 years have been spent in trying to further the Constitution.

In relation to my association with that organization, I was one of the lawyers in *United States* v. *United States District Court*. I argued it in the District Court, and I argued it in the Circuit Court, and I argued the brief in the Supreme Court. That was the case involving the Mitchell doctrine, which was authored by Justice Rehnquist when he was an assistant attorney general, and this may be the reason executive privilege has been asserted. But while he was Assistant Attorney General, Office of Legal Counsel, he advised the President that it was perfectly all right to wiretap without a warrant whenever the President decided to do so; that he had the inherent power to violate the fourth amendment. This was the power to wiretap domestic groups and individuals. Nothing could be more unconstitutional than what was urged and what Mr. Rehnquist both formulated and advocated.

In the Court of Appeals, Circuit Judge Edwards—and I will quote this portion when the Circuit Court voted to invalidate this strange rule—he said,

> It is strange, indeed, that in this case the traditional powers of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms which the founders of this country overthrew King George's reign.

The Supreme Court by a vote of 8 to zero—Justice Rehnquist did abstain in that case because he was the author of the very doctrine which was being invalidated—8 to zero, voted on June 19, 1972, 2 days after Watergate, to invalidate that claim of inherent power.

Justice Douglas called it an awesome, terrible, horrendous claim, using words like that. If a Justice of the Supreme Court was willing to violate the Constitution, one of its most sacred tenets, the fourth amendment, which as you know from the Declaration of Independence was one of the causes of the American Revolution, the writs of assistance which were urged by the King. The same type of power that Justice Rehnquist urged upon the President which the President adopted as his own private law and which was used, as Senator Kennedy said, for surveillance and wiretapping.

I wish that Senator Byrd had gone further and asked him whether he was the one who authored the opinion that it was perfectly all right to violate the fourth amendment to President Nixon.

I think that you have a Justice here who does not understand the Constitution and will destroy, if he can, the written Constitution. That is what that decision amounted to.

A man who will tell the President of the United States that he has the power to tap anybody's phone without a warrant, without judicial authority, is not fit to sit as an Associate Justice, much less the Chief Justice of the U.S. Supreme Court.

I have quoted from the opinions in the *United States* v. the *United States District Court,* when this outlandish opinion was first voiced, called the Mitchell doctrine. It was the foundation of the Houston plan; it was the very heart of it, and I think that the assertion of executive privilege here, much the same as was asserted during the Nixon days—and you must remember that one of the men who made the decision and recommended it was Mr. Cooper who was Mr. Justice Rehnquist's law clerk some years ago in the Supreme Court—that this aspect of his life and the assertion of executive privilege, and of course, he was the author of that legal memorandum as well as the efficacy of executive privilege to President Nixon, that such a man is not fit to sit upon this Court and violate this Constitution.

I think that the committee ought to subpoena and fight this issue of executive privilege on those documents. They are being hidden. I think Senator Kennedy is absolutely right. They are being hidden, as they were hidden in the Nixon days. They are being hidden because they do not want you to see the memoranda as to the use of the Mitchell doctrine, the wiretapping without a warrant of American citizens and American organizations.

I think if we are going to have a full investigation, this committee ought to have that material. And to say, as Senator Thurmond says, that ends the matter, I hope that there will be a majority of the committee, though my hopes are not very great; but I do have hopes, as I live long enough, they grow longer than I am. But I have hopes that there will be consideration of a subpoena in challenging this assertion of executive privilege on a matter that is 15 years old, or more than that. It probably goes back 17 or 18 years old, and cannot fulfill any part of the President's directive on the assertion of executive privilege.

The **CHAIRMAN**. I believe your time is up.

Mr. **KUNSTLER**. I just ended. Perfect.

[Statement follows:]

STATEMENT OF WILLIAM M. KUNSTLER
Vice President, Center for Constitutional Rights,
Submitted to the Committee on the Judiciary, United States Senate,
in Opposition to the Confirmation of William H. Rehnquist
as Chief Justice of the United States

I am a founder and vice-president of the Center for Constitutional Rights, a privately-funded and non-profit legal center, dedicated to the creative use of law as a positive force for social change, and to the training of young lawyers to participate in this process. For almost twenty years, the Center has applied the letter and spirit of the American Constitution to the unfolding struggle for human rights, both here and abroad. It is a relentless foe of those who ignore the Constitution's mandate and twist its meanings to deny freedom and equality to those less privileged and powerful than themselves.

It is in the light of these principles and objectives that we oppose the confirmation of William H. Rehnquist as Chief Justice of the United States. While we hardly share the nominee's archconservative views, our opposition is based squarely on what we consider to be his mindset that the President has the inherent power to suspend or override the written Constitution and the laws of the land whenever he feels it necessary to do so. In this vein, the Supreme Court forcefully reminded us, a century ago, that "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the reat exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort [the recently concluded Civil War] to throw off its just authority." Ex Parte Milligan, 4 Wall. 2-142, 18 L. Ed. 281, 295 (1866). (material in brackets added).

It is our understanding, based upon our intimate connection with the case in which then Attorney General John N. Mitchell advanced what has become known as the Mitchell Doctrine, namely that the Executive Branch had the inherent power to conduct warrantless wiretapping, in open disregard of th Fourth Amendment, upon domestic groups and individuals whenever it decided that it would be in the national interest to do so, that Justice Rehnquist was the chief architect and spokesperson of this incredible thesis. Fortunately for all of us, the tribunals which were first confronted with this contention -- the District Court, the Court of Appeals and the Supreme Court (with Justice Rehnquist recusing himself) --, decided against such an outrageously unconstitutional assertion of tyrannical executive power.

In writing for the Court of Appeals majority, Circuit Judge Edwards pointed out that "It is strange, indeed, that in this case, the traditional powers of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign." United States v. United States District Court, 444 F. 2d 651, 665 (6th Cir. 1971). In his concurring opinion in the Supreme Court's 8-0 repudiation of the doctrine, Justice Douglas referred to it as the "terrifying ... claim of inherent power ..." 407 U.S. 297, 332 (1972). Five years earlier, when the phrase "national defense" was urged as the rubric for suspending the Constitution, then Chief Justice Warren noted that "[I]mplicit in the term 'national defense' is the notion of defending those values and ideas which set this Nation apart ... It would indeed be ironic if, in the name of national defense, we would sanction the subversion of ... those liberties ... which [make] the defense of the Nation worthwhile." United States v. Robel, 389 U.S. 258, 264 (1967).

At the time when the Mitchell Doctrine was developed, Justice Rehnquist was the Assistant Attorney General in the Office of Legal Counsel. As such, he served essentially as outside counsel to the President in contrast to the in-house role then played by John Dean. His formulation of and support for the

Mitchell Doctrine, a fact that was not fully considered because of the nominee's reluctance during his original confirmation hearings before this Committee in 1971, Hearings before the Committee of the Judiciary, United States Senate, 92nd Congress, 1st Session, November 3, 4, 8, 9 and 10, 1971, makes him unfit to sit on a body which, in fulfilling its official functions, must never permit any suspension whatsoever of our written Constitution and, in particular, its Bill of Rights, no matter how exigent the pressures of the moment may be considered to be.

If the Mitchell Doctrine had been validated by the Supreme Court, it would have served as the keystone of the Nixon Administration's horrendous 1970 intelligence-gathering Huston Plan, The White House Transcripts, New York: Bantam Books, Inc., 1974, at 808, 813 and 857.[1] Not only would the concept of the supremacy of the written Constitution as the law of the land, and the power of the federal judiciary to interpret it, have been dealt a severe, and possibly mortal blow, but King George's infamous Writs of Assistance, one of the direct causes of the American Revolution, would have undergone a tragic latter-day revival. Can it be safely assumed that a nominee for the highest and most influential judicial post in the country who countenances such a denigration of the Fourth Amendment and, by necessary inference, the entire Constitution, would not, if confirmed, apply his thoroughly anti-American concepts to the assignment and decisions of cases argued before the High Court? His unfortunate track record as an Associate Justice, demonstrating his predilection to side in almost every instance, with the Executive Branch against individual rights, amply proves that the Rehnquist of 1986 is indistinguishable from the Renhquist of 1969.

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[1] On July 23, 1970, the President approved a 43-page report (Huston Plan) of an interagency committee, recommending surreptitious entry, covert mail coverage and other activities conceded by the Committee to be "clearly illegal", The White House Transcript, at 813.

We must concede that we cannot document the full nature of Justice Rehnquist's participation in the formulation and vending of the Mitchell Doctrine. What we do know is his position in the Office of the Attorney General at the time it was urged upon the District Court, the fact that Robert C. Mardian, his fellow Arizonan, argued its acceptance before both the Court of Appeals and the Supreme Court, and his majority and dissenting opinions as an Associate Court. However, we do understand that there are some 330 or so of his memoranda as an Assistant Attorney General included in the Nixon papers presently lodged in the National Archives. Surely, this Committee has the power to obtain access to these documents which, like the memos of Justice Rehnquist contained in the late Justice Robert H. Jackson's papers at the Library of Congress, may furnish a clearer indication of such an unrestrained and pervasive bias in favor of governmental authority over individual freedoms as cannot be tolerated in the Nation's chief judicial officer without jeopardizing the rule of law and the written Constitution itself.

In addition, a searching inquiry into Justice Rehnquist's activities as an Assistant Attorney General may well shed some light on one of the deepest mysteries of the Watergate scandals. As this Committee knows, the so-called White House burglars -- McCord, Barker, Martinez, Gonzales and Sturgis -- had, after two prior unsuccessful attempts, broken into the Democratic National Committee's Watergate headquarters on May 28, 1972, and installed a number of bugging devices. The White House Transcripts, supra, at 819. On June 16, 1972, this same quintet was again ordered to travel to Washington, D.C. from Miami, Florida, and directed to re-enter the same premises, but were arrested while inside during the early morning hours of June 17, 1972, a Saturday. Ibid., at 820. The following Monday, June 19th, the Supreme Court announced its repudiation of the Mitchell Doctrine. Ibid., at 821.

There has never been a satisfactory public explanation of why exactly the same personnel who had installed the bugging equipment at the Democratic National Committee's Watergate offices on May 28th were ordered to undertake another foray there three weeks later. A highly plausible rationale is that the White House had been leaked information as to the nature of the impending Supreme Court decision and opted to remove the wire-tapping devices before they lost any arguable legitimacy. In this connection, it may be highly significant that the missing eighteen minutes in the White House tapes involve a conversation between the President and H.R. Haldeman, his chief of staff, on June 20, 1972. Ibid., at 867.[2]

This chronology raises a reasonable suspicion that the Supreme Court's decision had been leaked to the White House. Advance notice of Supreme Court rulings, while presumably rare in our history, are not unknown. The most dramatic, of course, were the letters written by at least two Associate Justices to President-Elect James Buchanan in 1857 furnishing him with intelligence as to the pending Dred Scott decision. While we certainly cannot prove that such a leak occurred in this particular case, the facts and circumstances set forth above certainly raise the distinct possibility that the Administration was tipped off as to the nature of the impending ruling and acted on that information to direct the removal of the Watergate taps. At the very least, it appears to us that it is highly appropriate for this Committee, at this propitious moment, to conduct an inquiry into this matter by calling before it those who, like Mr. Haldeman, might well have direct knowledge of the matter. Whether or not the results of such an investigation would have any bearing on the Committee's present considerations, it seems to us that both the public and the dictates of history call for an independent review of the available witnesses and documentation.

This completes the written statement on behalf of the Center for Constitutional Rights. I gratefully acknowledge the assistance in its preparation of my fellow founders at the Center, Rutgers University Law School Prof. Arthur Kinoy, a vice-president, and Morton Stavis, its president, as well as that of the entire staff.

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[2] On November 27, 1973, Rose Mary Woods, the President's personal secretary, testified before District Judge John J. Sirica that she accidentally erased only five minutes of this tape. Ibid., at 868.

The CHAIRMAN. I let you go over several minutes. The 5-minute bell just rang for a vote.

Senator BIDEN. I have one question. Mr. Kunstler, how would you respond to the following assertion: That notwithstanding the fact that Justice Rehnquist authored those memos, he was just being a good lawyer for his client, the President, who wanted that position taken. He wanted justification for the position, and he went out to find justification, attempt to find it; and that once he was in a different position as a Justice, his decision relative to similar matters—wiretapping in particular—did not reflect what in fact his assertions had been as an attorney for his client, the President, several years earlier?

Mr. KUNSTLER. I have two answers, Senator Biden, on two different levels. No. 1, any lawyer who advises his client to violate the Constitution should not be a lawyer.

No. 2, leopards do not change spots. And the consistent history of siding with the executive branch authority over individual rights by Justice Rehnquist, I think proves that. Many people here have said he has been the most consistent conservative—if that is the term—on the Court. He does not change, and he will not change. And I think any thoughts that he will change is an illusion.

Senator BIDEN. Mr. Chairman, just as I was prepared to get together with Mr. Fein, I suggest you get together with Mr. Kunstler.

I do not have any more questions. I just want to know if you will make the same offer to him as I made to his predecessor here.

Mr. KUNSTLER. Senator Thurmond and I have one thing in common only: We both have very young children, at an advanced age. [Laughter.]

The CHAIRMAN. Thank you very much. We will be in recess.

Mr. KUNSTLER. Thank you.

[Brief recess.]

The CHAIRMAN. Senator Simon, should we go ahead with some of these witnesses?

Senator SIMON. Yes. Let us go ahead.

The CHAIRMAN. Panel No. Eight, I will ask the following witnesses to come around: Dr. Robert L. Maddox, executive director, Americans United for Separation of Church and State; Ms. Joan Messing Graff, executive director of Legal Aid Society of San Francisco; Mr. Robert McGlotten, American Federation of Labor and Congress of Industrial Organizations; Mr. Jeffrey Levi, National Gay and Lesbian Task Force—is he here? Come around and have a seat—Ms. Karen Shields, executive director of National Abortion Rights Action League. Is she here? All stand and be sworn.

Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Dr. MADDOX. I do.

Mr. LEVI. I do.

Ms. SHIELDS. I do.

Senator SIMON. Mr. Chairman, I am advised I have to duck out for a few minutes. One of these witnesses is from Illinois, and I hope you treat her especially well.

The CHAIRMAN. Thank you.

Dr. Maddox is No. 1. Jeffrey Levi—do you pronounce it Levi or Levy?

Mr. LEVI. Levi.

The CHAIRMAN. And Ms. Shields. All right. Those who are not here on panel eight, we will give them the opportunity to submit a written statement for the record, if they care to do so.

Dr. Maddox, you may proceed and you have 3 minutes. We will put your entire statements into the record if you have a written statement.

TESTIMONY OF PANEL CONSISTING OF DR. ROBERT L. MADDOX, EXECUTIVE DIRECTOR, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; JEFFREY LEVI, EXECUTIVE DIRECTOR, NATIONAL GAY & LESBIAN TASK FORCE; AND KAREN SHIELDS, BOARD CHAIR, NATIONAL ABORTION RIGHTS ACTION LEAGUE

Dr. MADDOX. Mr. Chairman and Senators, I am Robert Maddox, the executive director of Americans United for Separation of Church and State. We have more than 50,000 members from every possible walk of life in America. We at Americans United believe that religious liberty is the pre-eminent liberty of the American republic, the benchmark of all other civil liberties.

We believe that the constitutional guarantee of religious freedom through the separation of church and state is the single most important contribution this country has made to Western civilization during these past two centuries.

On the basis of that, we respectfully suggest that the Senate ask itself some serious questions as it considers the nomination of Mr. Justice Rehnquist to be Chief Justice of the United States.

While we recognize his qualifications, we have grave questions about his stand, his consistent stand throughout all of his public career, particularly his time on the Court in terms of religious liberty and the separation of church and state.

Mr. Rehnquist has consistently denigrated the idea of the separation of church and state. He said the wall idea by Mr. Jefferson is a "useless metaphor" and should be completely "abandoned," to quote Mr. Rehnquist. This reasoning deeply disturbs me. The idea of the separation of church and state has stood us in very good stead for 200 years and plus. It has provided for the most vigorous religious community, at least in the Western world, if not in the entire world; in large measure because of this healthy separation between church and state. And we fear that Mr. Rehnquist would destroy not only the wall, but would destroy the very idea of separation of church and state itself.

The establishment and free exercise clauses of the First Amendment are the co-guarantors of religious freedom. Mr. Rehnquist has, in our view, a very poor understanding and appreciation of the establishment clause, even from time to time advocating that government find ways to fund religion.

But as bad as the establishment clause is, our studies have shown that he is worse when it comes to the free exercise clause. Careful legal studies done by our counsel and others indicate that Mr. Rehnquist, in his consistent view that the State ought to have its way over all other individual and civil liberties, would just in practicality obliterate the free exercise clause and would make it virtually impossible for an individual to bring a case before a Federal court of any level—much less the Supreme Court—under the free exercise clause.

He would absolutely destroy the free exercise. It is apparent that he would substantially reduce the importance and impact of both of the religion clauses, but particularly the free exercise clause. Under him it would be virtually impossible for an individual to win a case over the State.

As the late, great Senator Sam Ervin said,

> If any provision in the Constitution can be said to be more precious than the others, it is the provision of the First Amendment which undertakes to separate church and state by keeping government's hands out of religion and by denying to any and all religious denominations any advantage from gaining control of public policy or the public purse. This is so,

Mr. Ervin said,

> Because the history of nations makes this truth manifest. When religion controls government, political freedom dies. And when government controls religion, religious freedom perishes.

We think Mr. Rehnquist would deal a near mortal blow to the religion clause of the First Amendment.

Thank you, Sir.

[Statement follows:].

TESTIMONY OF

DR. ROBERT L. MADDOX
Executive Director

AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE

Mr. Chairman and Members of the Committee,

I am Robert L. Maddox, executive director of Americans United for Separation of Church and State, a 39-year old national organization dedicated exclusively to the preservation of religious liberty and the separation of church and state. We represent within our membership of 50,000 a broad spectrum of religious and political viewpoints. But we are all united in the conviction that separation of church and state is essential. As Justice Wiley Rutledge observed in his 1947 Everson opinion: "We have staked the very existence of our country on the faith that a complete separation between the state and religion is best for the state and best for religion."

We at Americans United believe that religious liberty is the preeminent liberty of the American republic, the benchmark of all other civil liberties. We believe that the constitutional guarantee of religious liberty through the separation of church and state is the single most important contribution this country has made to Western civilization during the past two centuries.

Accordingly, we believe the Senate should ask itself some serious questions as it considers the nomination of Mr. Justice Rehnquist to be Chief Justice of the United States. Indeed we feel that his record of opposition to the principles of religious liberty enunciated by the Supreme Court during the past four decades renders him a questionable choice to be this nation's Chief Justice.

We recognize his qualifications in terms of scholarship and longevity. But these are not enough. As the late and revered Senator Sam J. Ervin of North Carolina wrote in his autobiography Preserving the Constitution: "Experience makes this proposition indisputable: Although one may possess a brilliant intellect and be actuated by lofty motives, he is not qualified for the station of judge in a government of laws unless he is able and willing to subject himself to the restraint inherent in the judicial process."

Respectfully I suggest we look in detail at Mr. Rehnquist's record on the vital issues affecting the relationship between church and state. In his 1985 dissent in the Alabama silent prayer case, Jaffree v. Wallace [see Appendix I], Mr. Rehnquist attacked the very concept of a wall of separation of church and state. He said the Supreme Court should never have given legal credence to "Jefferson's misleading metaphor." Mr. Rehnquist continued, "There is simply no historical foundation for the proposition that the Framers intended to build the wall of separation that was constitutionalized in Everson." He said the First Amendment was not meant to require "government neutrality between religion and irreligion, nor did it prohibit the federal government from providing nondiscriminatory aid to religion." He claimed that the Everson decision rendered in 1947 lacked historical support and practical workability and concluded, "It has proven all but useless as guide to sound constitutional adjudication. The wall of separation between church and state is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned."

This reasoning deeply disturbs us. It is in fact a distortion of our history. Separation between church and state was a major political and religious impulse in the era when the Constitution and Bill of Rights came into being. Our history teaches us that the institutional separation of church and state was the mechanism the Founding Fathers decided upon as a way to preserve religious peace and harmony in the United States and to make possible a flowering of voluntary religion. Most state constitutions and state courts have followed the example of the Federal Bill of Rights. Indeed many of them removed their religious establishments within a few decades of the passage of the Bill of Rights. Every state constitution maintains a vigorous and zealous guarantee of religious liberty.

President Jefferson used the expression "wall of separation between church and state" in a letter to an association of Baptists in Danbury, Connecticut on January 1, 1802. He wished to enunciate some of his principles concerning church and state and what he believed to be the proper intent of the Framers of the Constitution. Mr. Jefferson even cleared his letter with the Attorney General. While it is true that the Supreme Court did not apply the entire Bill of Rights to the several states until the Cantwell decision in 1940, it is also a historical fact that in 1878 a unanimous Supreme Court said that the wall concept "may be accepted almost as an authorative declaration of the scope and effect of the Amendment."

Mr. Rehnquist's record reflects this misunderstanding of history. In a dissent in a 1981 case (Thomas v. Review Board of Indiana Employment Securities) he expressed regret that the Supreme Court has not allowed "a greater degree of flexibility to the federal and state governments in legislating consistently for the Exercise Clause." He also found the Court's treatment of the Establishment Clause "totally unsatisfying." In a footnote to that case Rehnquist wrote, "It might be argued that cases such as McCollum v. Board of Education, Engel v. Vitale, Abington v. Schempp, Lemon v. Kurtzman, and PEARL v. Nyquist were wrongly decided."

In an analysis of the Rehnquist dissent, Professor Donald Boles of Iowa State University observed, "The impact on present educational policy is stunning. It would mean that programs such as released time religious exercise held in public school buildings would be permissible as would the state-dictated programs of school prayer and Bible reading. In addition, direct state financial aid to parochial elementary and secondary schools would be authorized as would direct state tuition rebates and tax credits to parents with children attending parochial schools. In short, almost forty years of clearly established judicial precedent would be overthrown by this so-called conservative."

At this critical juncture in United States history when change is buffeting our institutions at every level, we simply cannot take a chance on eliminating our best guarantee of religious freedom and our best safeguard against religious tyranny and religious conflict which has brought sorrow to so many nations on earth. To preserve religious freedom it will be necessary to reject the nomination of Mr. Rehnquist.

As the late Senator Sam Ervin wrote shortly before he died, "If any provision in the Constitution can be said to be more precious than the others, it is the provision of the First Amendment which undertakes to separate church and state by keeping government's hands out of religion and by denying to any and all religious denominations any advantage from getting control of public policy or the public purse. This is so because the history of nations makes this truth manifest: When religion controls government, political freedom dies, and when government controls religion, religious freedom perishes."

APPENDIX I

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* JAFFREE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-812. Argued December 4, 1984—Decided June 4, 1985*

In proceedings instituted in Federal District Court, appellees challenged the constitutionality of, *inter alia*, a 1981 Alabama statute (§ 16-1-20.1) authorizing a 1-minute period of silence in all public schools "for meditation or voluntary prayer." Although finding that § 16-1-20.1 was an effort to encourage a religious activity, the District Court ultimately held that the Establishment Clause of the First Amendment does not prohibit a State from establishing a religion. The Court of Appeals reversed.

Held: Section 16-1-20.1 is a law respecting the establishment of religion and thus violates the First Amendment. Pp. 9-23.

(a) The proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does Congress is firmly embedded in constitutional jurisprudence. The First Amendment was adopted to curtail Congress' power to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience, and the Fourteenth Amendment imposed the same substantive limitations on the States' power to legislate. The individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. Moreover, the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. Pp. 9-16.

(b) One of the well-established criteria for determining the constitutionality of a statute under the Establishment Clause is that the statute must have a secular legislative purpose. *Lemon* v. *Kurtzman*, 403

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*Together with No. 83-929, *Smith et al.* v. *Jaffree et al.*, also on appeal from the same court.

U. S. 602, 612–613. The First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion. Pp. 16–18.

(c) The record here not only establishes that § 16-1-20.1's purpose was to endorse religion, it also reveals that the enactment of the statute was not motivated by any clearly secular purpose. In particular, the statements of § 16-1-20.1's sponsor in the legislative record and in his testimony before the District Court indicate that the legislation was solely an "effort to return voluntary prayer" to the public schools. Moreover, such unrebutted evidence of legislative intent is confirmed by a consideration of the relationship between § 16-1-20.1 and two other Alabama statutes—one of which, enacted in 1982 as a sequel to § 16-1-20.1, authorized teachers to lead "willing students" in a prescribed prayer, and the other of which, enacted in 1978 as § 16-1-20.1's predecessor, authorized a period of silence "for meditation" only. The State's endorsement, by enactment of § 16-1-20.1, of prayer activities at the beginning of each school day is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion. Pp. 18–23.

705 F. 2d 1526 and 713 F. 2d 614, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion. O'CONNOR, J., filed an opinion concurring in the judgment. BURGER, C. J., and WHITE and REHNQUIST, JJ., filed dissenting opinions.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83-812 v.
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 v.
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

At an early stage of this litigation, the constitutionality of three Alabama statutes was questioned: (1) § 16-1-20, enacted in 1978, which authorized a one-minute period of silence in all public schools "for meditation";[1] (2) § 16-1-20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer";[2] and (3) § 16-1-20.2, enacted in

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[1] Alabama Code § 16-1-20 (Supp. 1984) reads as follows:

"At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in."

Appellees have abandoned any claim that § 16-1-20 is unconstitutional. See Brief for Appellees 2.

[2] Alabama Code § 16-1-20.1 (Supp. 1984) provides:

"At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration

1982, which authorized teachers to lead "willing students" in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world."[4]

At the preliminary-injunction stage of this case, the District Court distinguished § 16-1-20 from the other two statutes. It then held that there was "nothing wrong" with § 16-1-20,[5] but that §§ 16-1-20.1 and 16-1-20.2 were both invalid because the sole purpose of both was "an effort on the part of the State of Alabama to encourage a religious activity."[6] After the trial on the merits, the District Court did not change its interpretation of these two statutes, but held that they were constitutional because, in its opinion, Alabama has the power to establish a state religion if it chooses to do so.[7]

The Court of Appeals agreed with the District Court's initial interpretation of the purpose of both §§ 16-1-20.1 and 16-1-20.2, and held them both unconstitutional.[8] We have

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shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

[4] Alabama Code § 16-1-20.2 (Supp. 1984) provides:

"From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:

"Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord. Amen."

[5] The court stated that it did not find any potential infirmity in § 16-1-20 because "it is a statute which prescribes nothing more than a child in school shall have the right to meditate in silence and there is nothing wrong with a little meditation and quietness." *Jaffree* v. *James*, 544 F. Supp. 727, 732 (SD Ala. 1982).

[6] *Ibid.*

[7] *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104, 1128 (SD Ala. 1983).

[8] *Jaffree* v. *Wallace*, 705 F. 2d 1526, 1535-1536 (CA11 1983).

already affirmed the Court of Appeals' holding with respect to §16-1-20.2.[8] Moreover, appellees have not questioned the holding that §16-1-20 is valid.[9] Thus, the narrow question for decision is whether §16-1-20.1, which authorizes a period of silence for "meditation or voluntary prayer," is a law respecting the establishment of religion within the meaning of the First Amendment.[10]

I

Appellee Ishmael Jaffree is a resident of Mobile County, Alabama. On May 28, 1982, he filed a complaint on behalf of three of his minor children; two of them were second-grade students and the third was then in kindergarten. The complaint named members of the Mobile County School Board, various school officials, and the minor plaintiffs' three teachers as defendants.[11] The complaint alleged that the appellees brought the action "seeking principally a declaratory judgment and an injunction restraining the Defendants and each of them from maintaining or allowing the maintenance of regular religious prayer services or other forms of religious observances in the Mobile County Public Schools in violation of the First Amendment as made applicable to states by the Fourteenth Amendment to the United States Constitution."[12] The complaint further alleged that two of the children had been subjected to various acts of religious indoctrination "from the beginning of the school year in September, 1981";[13] that the defendant teachers had "on a daily basis" led their classes in saying certain prayers in unison;[14] that the minor children were exposed to ostracism from their peer group class members if they did not participate;"[illegible] and that Ishmael Jaffree had repeatedly but unsuccessfully requested that the devotional services be stopped. The original complaint made no reference to any Alabama statute.

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[8] *Wallace* v. *Jaffree*, 466 U. S. — (1984).

[9] See n. 1, *supra*.

[10] The Establishment Clause of the First Amendment, of course, has long been held applicable to the States. *Everson* v. *Board of Education*, 330 U. S. 1, 15–16 (1947).

[11] App. 4–7.

[12] *Id.*, at 4.

[13] *Id.*, at 7.

[14] *Ibid.*

On June 4, 1982, appellees filed an amended complaint seeking class certification,[illegible] and on June 30, 1982, they filed a second amended complaint naming the Governor of Alabama and various State officials as additional defendants. In that amendment the appellees challenged the constitutionality of three Alabama statutes: §§ 16-1-20, 16-1-20.1, and 16-1-20.2.[illegible]

On August 2, 1982, the District Court held an evidentiary hearing on appellees' motion for a preliminary injunction. At that hearing, State Senator Donald G. Holmes testified that he was the "prime sponsor" of the bill that was enacted in 1981 as § 16-1-20.1.[illegible] He explained that the bill was an "effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction."[illegible] Apart from the purpose to return voluntary prayer to public school, Senator Holmes unequivocally testified that he had "no other purpose in mind."[illegible] A week after the hearing, the District Court entered a preliminary injunction.[illegible] The court held that appellees were likely to prevail on the merits because the enactment of §§ 16-1-20.1 and 16-1-20.2 did not reflect a clearly secular purpose.[illegible]

[illegible] *Id.*, at 8-9.

[illegible] *Id.*, at 17.

[illegible] *Id.*, at 21. See nn. 1, 2, and 3, *supra*.

[illegible] *Id.*, at 47-49.

[illegible] *Id.*, at 50.

[illegible] *Id.*, at 52.

[illegible] *Jaffree* v. *James*, 544 F. Supp. 727 (SD Ala. 1982).

[illegible] See *Lemon* v. *Kurtzman*, 403 U. S. 602, 612-613 (1971). Insofar as relevant to the issue now before us, the District Court explained:

"The injury to plaintiffs from the possible establishment of a religion by the State of Alabama contrary to the proscription of the establishment

In November 1982, the District Court held a four-day trial on the merits. The evidence related primarily to the 1981–1982 academic year—the year after the enactment of § 16–1–20.1 and prior to the enactment of § 16–1–20.2. The District Court found that during that academic year each of the minor plaintiffs' teachers had led classes in prayer activities, even after being informed of appellees' objections to these activities.[9]

In its lengthy conclusions of law, the District Court reviewed a number of opinions of this Court interpreting the

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clause outweighs any indirect harm which may occur to defendants as a result of an injunction. Granting an injunction will merely maintain the status quo existing prior to the enactment of the statutes.

. . . . .

"The purpose of Senate Bill 8 [§ 16–1–20.2], as evidenced by its preamble, is to provide for a prayer that may be given in public schools. Senator Holmes testified that his purpose in sponsoring § 16–1–20.1 was to return voluntary prayer to the public schools. He intended to provide children the opportunity of sharing in their spiritual heritage of Alabama and of this country. See Alabama Senate Journal 921 (1981). The Fifth Circuit has explained that 'prayer is a primary religious activity in itself . . .' *Karen B.* v. *Treen*, 653 F. 2d 897, 901 (5th Cir. 1981). The state may not employ a religious means in its public schools. *Abington School District* v. *Schempp*, [374 U. S. 203, 224] (1963). Since these statutes do not reflect a clearly secular purpose, no consideration of the remaining two-parts of the *Lemon* test is necessary.

"The enactment of Senate Bill 8 [§ 16–1–20.2] and § 16–1–20.1 is an effort on the part of the State of Alabama to encourage a religious activity. Even though these statutes are permissive in form, it is nevertheless state involvement respecting an establishment of religion. *Engle* v. *Vitale*, [370 U. S. 421, 430] (1962). Thus, binding precedent which this Court is under a duty to follow indicates the substantial likelihood plaintiffs will prevail on the merits." 544 F. Supp., at 730–732.

[9] The District Court wrote:

"Defendant Boyd, as early as September 16, 1981, led her class at E. R. Dickson in singing the following phrase:

"'God is great, God is good,'
"'Let us thank him for our food,
"'bow our heads we all are fed,
"'Give us Lord our daily bread.

Establishment Clause of the First Amendment, and then embarked on a fresh examination of the question whether the First Amendment imposes any barrier to the establishment of an official religion by the State of Alabama. After reviewing at length what it perceived to be newly discovered historical evidence, the District Court concluded that "the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion."[9] In a separate opinion, the District Court dismissed appellees' challenge to the three Alabama statutes because of a failure to state any claim for which relief could be granted. The court's dismissal of this challenge was

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" 'Amen.'

"The recitation of this phrase continued on a daily basis throughout the 1981-82 school year.

. . . . .

"Defendant Pixie Alexander has led her class at Craighead in reciting the following phrase:

" 'God is great, God is good,

" 'Let us thank him for our food.'

"Further, defendant Pixie Alexander had her class recite the following, which is known as the Lord's Prayer:

" 'Our Father, which are in heaven, hallowed be Thy name. Thy kingdom come. Thy will be done on earth as it is in heaven. Give us this day our daily bread and forgive us our debts as we forgive our debtors. And lead us not into temptation but deliver us from evil for thine is the kingdom and the power and the glory forever. Amen.'

"The recitation of these phrases continued on a daily basis throughout the 1981-82 school year.

. . . . .

"Ms. Green admitted that she frequently leads her class in singing the following song:

" 'For health and strength and daily food, we praise Thy name, Oh Lord.'

"This activity continued throughout the school year, despite the fact that Ms. Green had knowledge that plaintiff did not want his child exposed to the above-mentioned song." *Jaffree v. Board of School Commissioners of Mobile County*, 554 F. Supp., at 1107-1108.

[9] *Id.*, at 1128.

also based on its conclusion that the Establishment Clause did not bar the States from establishing a religion.[9]

The Court of Appeals consolidated the two cases; not surprisingly, it reversed. The Court of Appeals noted that this

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[9] *Jaffree* v. *James*, 554 F. Supp. 1130, 1132 (SD Ala. 1983). The District Court's opinion was announced on January 14, 1983. On February 11, 1983, JUSTICE POWELL, in his capacity as Circuit Justice for the Eleventh Circuit, entered a stay which in effect prevented the District Court from dissolving the preliminary injunction that had been entered in August 1982. JUSTICE POWELL accurately summarized the prior proceedings:

"The situation, quite briefly, is as follows. Beginning in the fall of 1981, teachers in the minor applicants' schools conducted prayers in their regular classes, including group recitations of the Lord's Prayer. At the time, an Alabama statute provided for a one-minute period of silence 'for meditation or voluntary prayer' at the commencement of each day's classes in the public elementary schools. Ala. Code § 16-1-20.1 (Supp. 1982). In 1982, Alabama enacted a statute permitting public school teachers to lead their classes in prayer. 1982 Ala. Acts 735.

"Applicants, objecting to prayer in the public schools, filed suit to enjoin the activities. They later amended their complaint to challenge the applicable state statutes. After a hearing, the District Court granted a preliminary injunction. *Jaffree* v. *James*, 544 F. Supp. 727 (1982). It recognized that it was bound by the decisions of this Court, *id.*, at 731, and that under those decisions it was 'obligated to enjoin the enforcement' of the statutes, *id.*, at 733.

"In its subsequent decision on the merits, however, the District Court reached a different conclusion. *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (1983). It again recognized that the prayers at issue, given in public school classes and led by teachers, were violative of the Establishment Clause of the First Amendment as that Clause had been construed by this Court. The District Court nevertheless ruled that 'the United States Supreme Court has erred.' *Id.*, at 1128. It therefore dismissed the complaint and dissolved the injunction.

"There can be little doubt that the District Court was correct in finding that conducting prayers as part of a school program is unconstitutional under this Court's decisions. In *Engel* v. *Vitale*, 370 U. S. 421 (1962), the Court held that the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, prohibits a State from authorizing prayer in the public schools. The following Term, in *Murray* v. *Curlett*, decided with *Abington School District* v. *Schempp*, 374

Court had considered and had rejected the historical arguments that the District Court found persuasive, and that the District Court had misapplied the doctrine of *stare decisis*.[22] The Court of Appeals then held that the teachers' religious activities violated the Establishment Clause of the First Amendment.[23] With respect to § 16-1-20.1 and § 16-1-20.2, the Court of Appeals stated that "both statutes advance and encourage religious activities."[24] The Court of Appeals then quoted with approval the District Court's finding that § 16-1-20.1, and § 16-1-20.2, were efforts "'to encourage a religious activity. Even though these statutes are permissive in

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U. S. 203 (1963), the Court explicitly invalidated a school district's rule providing for the reading of the Lord's Prayer as part of a school's opening exercises, despite the fact that participation in those exercises was voluntary.

"Unless and until this Court reconsiders the foregoing decisions, they appear to control this case. In my view, the District Court was obligated to follow them." *Jaffree* v. *Board of School Commissioners of Mobile County*, 459 U. S. 1314, 1314-1316 (1983).

[22] The Court of Appeals wrote:

"The *stare decisis* doctrine and its exceptions do not apply where a lower court is compelled to apply the precedent of a higher court. *See* 20 Am. Jur. 2d *Courts* § 183 (1965).

"Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court. *Hutto* v. *Davis*, [454 U. S. 370, 375] (1982) . . . . Justice Rehnquist emphasized the importance of precedent when he observed that 'unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.' *Davis*, [454 U. S. at 375]. *See Also*, *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, [460 U. S. 533, 535] (1983) (the Supreme Court, in a per curiam decision, recently stated 'Needless to say, only this Court may overrule one of its precedents')." *Jaffree* v. *Wallace*, 705 F. 2d, at 1532.

[23] *Id.*, at 1533-1534. This Court has denied a petition for a writ of certiorari that presented the question whether the Establishment Clause prohibited the teachers' religious prayer activities. *Board of School Commissioners of Mobile County, Alabama* v. *Jaffree*, 466 U. S. — (1984).

[24] 705 F. 2d, at 1535.

form, it is nevertheless state involvement respecting an establishment of religion.'"[22] Thus, the Court of Appeals concluded that both statutes were "specifically the type which the Supreme Court addressed in *Engle* [*v. Vitale*, 370 U. S. 421 (1962)]."[23]

A suggestion for rehearing en banc was denied over the dissent of four judges who expressed the opinion that the full court should reconsider the panel decision insofar as it held § 16-1-20.1 unconstitutional.[24] When this Court noted probable jurisdiction, it limited argument to the question that those four judges thought worthy of reconsideration. The judgment of the Court of Appeals with respect to the other issues presented by the appeals was affirmed. *Wallace* v. *Jaffree*, 466 U. S. —— (1984).

II

Our unanimous affirmance of the Court of Appeals' judgment concerning § 16-1-20.2 makes it unnecessary to comment at length on the District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion. Before analyzing the precise issue that is presented to us, it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.

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[22] *Ibid.*

[23] *Ibid.* After noting that the invalidity of § 16-1-20.2 was aggravated by "the existence of a government composed prayer," and that the proponents of the legislation admitted that that section "amounts to the establishment of a state religion," the court added this comment on § 16-1-20.1:

"The objective of the meditation or prayer statute (Ala. Code § 16-1-20.1) was also the advancement of religion. This fact was recognized by the district court at the hearing for preliminary relief where it was established that the intent of the statute was to return prayer to the public schools. *James*, 544 F. Supp at 731. The existence of this fact and the inclusion of prayer obviously involves the state in religious activities. *Beck* v. *McElrath*, 548 F. Supp 1161 (MD Tenn. 1982). This demonstrates a lack of secular legislative purpose on the part of the Alabama Legislature. Additionally, the statute has the primary effect of advancing religion. We do not imply that simple meditation or silence is barred from the public schools, we hold that the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity itself that concerns us, it is the purpose of the activity that we shall scrutinize. Thus, the existence of these elements require that we also hold section 16-1-20.1 in violation of the establishment clause." *Id.*, at 1535–1536.

[24] *Jaffree* v. *Wallace*, 713 F. 2d 614 (CA11 1983) (*per curiam*).

As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.[30] Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States.[31] But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again.[32]

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[30] The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[31] See *Permoli* v. *Municipality No. 1 of the City of New Orleans*, 3 How. 589, 609 (1845).

[32] See, *e. g.*, *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977) (right to refuse endorsement of an offensive state motto); *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949) (right to free speech); *Board of Education* v. *Barnette*, 319 U. S. 624, 633-634 (1943) (right to refuse to participate in a ceremony that offends one's conscience); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940) (right to proselytize one's religious faith); *Hague* v.

Writing for a unanimous Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), Justice Roberts explained:

> ". . . We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."

Cantwell, of course, is but one case in which the Court has identified the individual's freedom of conscience as the central liberty that unifies the various clauses in the First

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CIO, 307 U. S. 496, 519 (1939) (opinion of Stone, J.) (right to assemble peaceably), *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 707 (1931) (right to publish an unpopular newspaper), *Whitney* v. *California*, 274 U. S. 357, 375 (Brandeis, J., concurring) (right to advocate the cause of communism); *Gitlow* v. *New York*, 268 U. S. 652, 672 (1925) (Holmes, J., dissenting) (right to express an unpopular opinion); cf. *Abington School District* v. *Schempp*, 374 U. S. 203, 215, n. 7 (1963), where the Court approvingly quoted *Board of Education* v. *Minor*, 23 Ohio St. 211, 253 (1872), which stated

"The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government."

Amendment.[9] Enlarging on this theme, THE CHIEF JUSTICE recently wrote:

> "We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education* v. *Barnette*, 319 U. S. 624, 633–634 (1943); *id.*, at 645 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' *Id.*, at 637.
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> . . . . .
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> "The Court in *Barnette*, *supra*, was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures. In overruling its prior decision in *Minersville District* v. *Gobitis*, 310 U. S. 586 (1940), the Court held that 'a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority

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[9] For example, in *Prince* v. *Massachusetts*, 321 U. S. 158, 164 (1944), the Court wrote:

"If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. *Schneider* v. *State*, 308 U. S. 147, *Cantwell* v. *Connecticut*, 310 U. S. 296. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings."

See also *Widmar* v. *Vincent*, 454 U. S. 263, 269 (1981) (stating that religious worship and discussion "are forms of speech and association protected by the First Amendment").

under powers committed to any political organization under our Constitution.' 319 U. S., at 636. Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.' *Id.*, at 642." *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977).

Just as the right to speak and the right to refrain from speaking are complimentary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism.[illegible] But when the underlying princi-

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[illegible] Thus Joseph Story wrote:

"Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration [First Amendment], the general, if not the universal sentiment in America was, that christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation." 2 J. Story, Commentaries on the Constitution of the United States § 1874, p. 593 (1851) (footnote omitted).

In the same volume, Story continued:

ple has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.[illegible] This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the

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"The real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating christianity, *but to exclude all rivalry among christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion*, which had been trampled upon almost from the days of the Apostles to the present age . . ." *Id.*, § 1877, at 594 (emphasis supplied).

[illegible] Thus, in *Everson* v. *Board of Education*, 330 U. S., at 15, the Court stated:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

Id., at 18 (the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"); *Abington School District* v. *Schempp*, 374 U. S., at 216 ("this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); *id.*, at 226 ("The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality"); *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs").

product of free and voluntary choice by the faithful,[36] and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.[37] As

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[36] In his "Memorial and Remonstrance Against Religious Assessments, 1785," James Madison wrote, in part:

"1. Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the [Manner of discharging it, can be directed only by reason and] conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man, and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

. . . . .

"3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" The Complete Madison 299–301 (S. Padover ed. 1953).

See also *Engel* v. *Vitale*, 370 U. S. 421, 435 (1962) ("It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look for religious guidance").

[37] As the *Barnette* opinion explained, it is the teaching of history, rather than any appraisal of the quality of a State's motive, that supports this duty to respect basic freedoms:

Justice Jackson eloquently stated in *Board of Education v. Barnette*, 319 U. S. 624, 642 (1943):

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The State of Alabama, no less than the Congress of the United States, must respect that basic truth.

III

When the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years. Thus, in *Lemon v. Kurtzman*, 403 U. S. 602, 612–613 (1971), we wrote:

"Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." 319 U. S., at 640–641.

See also *Engel v. Vitale*, 370 U. S., at 431 ("a union of government and religion tends to destroy government and to degrade religion").

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz* [v. *Tax Commission*, 397 U. S. 664, 674 (1970)]."

It is the first of these three criteria that is most plainly implicated by this case. As the District Court correctly recognized, no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose.* For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, see, *e. g.*, *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 296–303 (1963) (BRENNAN, J., concurring), the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.*

In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion."* In this case, the answer to that question is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of § 16-1-20.1 was not motivated by any clearly secular purpose—indeed, the statute had no secular purpose.

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* See *supra*, n. 22.

* See *Lynch* v. *Donnelly*, 465 U. S. ——, —— (1984); *id.*, at —— (O'CONNOR, J., concurring); *id.*, at —— (BRENNAN, J., joined by MARSHALL, BLACKMUN and STEVENS, JJ., dissenting); *Mueller* v. *Allen*, 463 U. S. 388, —— - —— (1983); *Widmar* v. *Vincent*, 454 U. S., at 271; *Stone* v. *Graham*, 449 U. S. 39, 40–41 (1980) (*per curiam*); *Wolman* v. *Walter*, 433 U. S. 229, 236 (1977).

* *Lynch* v. *Donnelly*, 465 U. S., at —— (O'CONNOR, J., concurring) ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid").

IV

The sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools.[*] Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated, "No, I did not have no other purpose in mind."[*] The State did not present evidence of any secular purpose.*

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[*] The statement indicated, in pertinent part:

"Gentlemen, by passage of this bill by the Alabama Legislature our children in this state will have the opportunity of sharing in the spiritual heritage of this state and this country. The United States as well as the State of Alabama was founded by people who believe in God. *I believe this effort to return voluntary prayer to our public schools for its return to us to the original position of the writers of the Constitution, this local philosophies and beliefs hundreds of Alabamians have urged my continuous support for permitting school prayer. Since coming to the Alabama Senate I have worked hard on this legislation to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber.*" App. 50 (emphasis added).

[*] *Id.*, at 52. The District Court and the Court of Appeals agreed that the purpose of § 16-1-20.1 was "an effort on the part of the State of Alabama to encourage a religious activity." *Jaffree v. James*, 544 F. Supp., at 732; *Jaffree v. Wallace*, 705 F. 2d, at 1535. The evidence presented to the District Court elaborated on the express admission of the Governor of Alabama (then Fob James) that the enactment of § 16-1-20.1 was intended to "clarify [the State's] intent to have prayer as part of the daily classroom activity," compare Second Amended Complaint ¶ 32(d) (App. 24-25; with Governor's Answer to ¶ 32(d) (App. 40), and that the "expressed legislative purpose in enacting Section 16-1-20.1 (1981) was to 'return voluntary prayer to public schools,'" compare Second Amended Complaint ¶¶ 32(b) and (c) (App. 24) with Governor's Answer to ¶¶ 32(b) and (c) (App. 40).

The unrebutted evidence of legislative intent contained in the legislative record and in the testimony of the sponsor of § 16-1-20.1 is confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case. The District Court found that the 1981 statute and its 1982 sequel had a common, nonsecular purpose. The wholly religious character of the later enactment is plainly evident from its text. When the differences between § 16-1-20.1 and its 1978 predecessor, § 16-1-20, are examined, it is equally clear that the 1981 statute has the same wholly religious character.

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* Appellant Governor George C. Wallace now argues that § 16-1-20.1 "is best understood as a permissible accommodation of religion" and that viewed even in terms of the *Lemon* test, the "statute conforms to acceptable constitutional criteria." Brief for Appellant Wallace 5; see also Brief for Appellants Smith et al. 39 (§ 16-1-20.1 "accommodates the free exercise of the religious beliefs and free exercise of speech and belief of those affected"); *id.*, at 47. These arguments seem to be based on the theory that the free exercise of religion of some of the State's citizens was burdened before the statute was enacted. The United States, appearing as *amicus curiae* in support of the appellants, candidly acknowledges that "it is unlikely that in most contexts a strong Free Exercise claim could be made that time for personal prayer must be set aside during the school day." Brief for United States as *Amicus Curiae* 10. There is no basis for the suggestion that § 16-1-20.1 "is a means for accommodating the religious and meditative needs of students without in any way diminishing the school's own neutrality or secular atmosphere." *Id.*, at 11. In this case, it is undisputed that at the time of the enactment of § 16-1-20.1 there was no governmental practice impeding students from silently praying for one minute at the beginning of each school day; thus, there was no need to "accommodate" or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the Free Exercise Clause. See, *e. g.*, *Thomas* v. *Review Board, Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); see also *Abington School District* v. *Schempp*, 374 U. S., at 226 ("While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs"). What was missing in the appellants' eyes at time of the enactment of § 16-1-20.1—and therefore what is precisely the aspect that makes the statute unconstitutional—was the State's endorsement and promotion of religion and a particular religious practice.

There are only three textual differences between § 16-1-20.1 and § 16-1-20: (1) the earlier statute applies only to grades one through six, whereas § 16-1-20.1 applies to all grades; (2) the earlier statute uses the word "shall" whereas § 16-1-20.1 uses the word "may"; (3) the earlier statute refers only to "meditation" whereas § 16-1-20.1 refers to "meditation or voluntary prayer." The first difference is of no relevance in this litigation because the minor appellees were in kindergarten or second grade during the 1981-1982 academic year. The second difference would also have no impact on this litigation because the mandatory language of § 16-1-20 continued to apply to grades one through six.[*] Thus, the only significant textual difference is the addition of the words "or voluntary prayer."

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation.[*] Appellants have not identified any secular purpose that was not fully served by § 16-1-20 before the enactment of § 16-1-20.1. Thus, only two conclusions are consistent with the text of § 16-1-20.1: (1) the statute was enacted to convey a message of State endorsement and promotion of prayer, or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.[*]

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[*] See n. 1, supra.

[*] Indeed, for some persons meditation itself may be a form of prayer. B. Larson, Larson's Book of Cults 62–65 (1982); C. Whittier, Silent Prayer and Meditation in World Religions 1–7 (Cong. Research Service 1982).

[*] If the conclusion that the statute had no purpose were tenable, it would remain true that no purpose is not a secular purpose. But such a

We must, therefore, conclude that the Alabama Legislature intended to change existing law[*] and that it was motivated by the same purpose that the Governor's Answer to the Second Amended Complaint expressly admitted; that the statement inserted in the legislative history revealed; and that Senator Holmes' testimony frankly described. The Legislature enacted § 16-1-20.1 despite the existence of § 16-1-20 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion.[*]

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political major-

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conclusion is inconsistent with the common-sense presumption that statutes are usually enacted to change existing law. Appellants do not even suggest that the State had no purpose in enacting § 16-1-20.1.

[*] *United States v. Champlin Refining Co.*, 341 U. S. 290, 297 (1951) (a "statute cannot be divorced from the circumstances existing at the time it was passed"); *id.*, at 296 (refusing to attribute pointless purpose to Congress in the absence of facts to the contrary); *United States v. National City Lines, Inc.*, 337 U. S. 78, 80–81 (1949) (rejecting Government's argument that Congress had no desire to change law when enacting legislation).

[*] See, e. g., *Stone v. Graham*, 449 U. S., at 42 (per curiam); *Committee for Public Education v. Nyquist*, 413 U. S. 756, 792–793 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion"); *Epperson v. Arkansas*, 393 U. S. 97, 109 (1968); *Abington School District v. Schempp*, 374 U. S., at 215–222; *Engel v. Vitale*, 370 U. S., at 430 ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause"); *Illinois ex rel McCollum v. Board of Education*, 333 U.S 203, 211-212 (1948); *Everson v. Board of Education*, 330 U. S., at 18.

ity.[50] For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the Government intends to convey a message of endorsement or disapproval of religion."[51] The well-supported concurrent findings of the District Court and the Court of Appeals—that § 16-1-20.1 was intended to convey a message of State-approval of prayer activities in the public schools—make it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words "or voluntary prayer" to the statute. Keeping in mind, as we must, "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded,"[illegible] we conclude that § 16-1-20.1 violates the First Amendment.

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[50] As this Court stated in *Engel* v. *Vitale*, 370 U. S., at 430.

> "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."

Moreover, this Court has noted that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.*, at 431. This comment has special force in the public-school context where attendance is mandatory. Justice Frankfurter acknowledged this reality in *McCollum* v. *Board of Education*, 333 U. S. 203, 227 (1948) (concurring opinion):

> "That a child is offered an alternative may reduce the constraint, it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children."

See also *Abington School District* v. *Schempp*, 374 U. S., at 290 (BRENNAN, J., concurring), cf. *Marsh* v. *Chambers*, 463 U. S. 783, 792 (1983) (distinguishing between adults not susceptible to "religious indoctrination" and children subject to "peer pressure"). Further, this Court has observed:

> "That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Board of Education* v. *Barnette*, 319 U. S., at 637.

[51] *Lynch* v. *Donnelly*, 465 U. S., at —— (O'CONNOR, J., concurring) ("The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. . . . The proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion").

The judgment of the Court of Appeals is affirmed.

It is so ordered.

[illegible] *Id.*, at —.

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE
OF ALABAMA, ET AL., APPELLANTS
83-812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE POWELL, concurring.

I concur in the Court's opinion and judgment that Ala. Code § 16-1—20.1 violates the Establishment Clause of the First Amendment. My concurrence is prompted by Alabama's persistence in attempting to institute state-sponsored prayer in the public schools by enacting three successive statutes.[1] I agree fully with JUSTICE O'CONNOR's assertion that some moment-of-silence statutes may be constitutional,[2] a suggestion set forth in the Court's opinion as well. *Ante*, at 20.

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[1] The three statutes are Ala. Code § 16-1-20 (Supp. 1984) (moment of silent meditation), Ala. Code § 16-1-20.1 (Supp. 1984) (moment of silence for meditation or prayer), and Ala. Code § 16-1-20.2 (Supp. 1984) (teachers authorized to lead students in vocal prayer). These statutes were enacted over a span of four years. There is some question whether § 16-1-20 was repealed by implication. The Court already has summarily affirmed the Court of Appeals' holding that § 16-1-20.2 is invalid. *Wallace* v. *Jaffree*, — U. S. — (1984). Thus, our opinions today address only the validity of § 16-1-20.1. See *ante*, at 2.

[2] JUSTICE O'CONNOR is correct in stating that moment-of-silence statutes cannot be treated in the same manner as those providing for vocal prayer.

I write separately to express additional views and to respond to criticism of the three-pronged *Lemon* test.[5] *Lemon v. Kurtzman*, 403 U. S. 602 (1972), identifies stand-

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"A state sponsored moment of silence in the public schools is different from state sponsored vocal prayer or Bible reading. *First*, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. *Second*, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading. Scholars and at least one member of this Court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional. See *Abington*, 374 U. S., at 281 (BRENNAN, J., concurring) ("The observance of a moment of reverent silence at the opening of class" may serve "the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government"); L. Tribe, American Constitutional Law, § 14-6, at 829 (1978); P. Freund, "The Legal Issue," in Religion in the Public Schools 23 (1965); Choper, *supra*, 47 Minn. L. Rev., at 371; Kauper, Prayer, Public Schools, and the Supreme Court, 61 Mich L. Rev. 1031, 1041 (1963). As a general matter, I agree. It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren."

Post, at 6-7 (O'CONNOR, J., concurring in the judgment).

[5] JUSTICE O'CONNOR asserts that the "standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment." *Post*, at 2-3 (O'CONNOR, J., concurring). JUSTICE REHNQUIST would discard the *Lemon* test entirely. *Post*, at 25 (REHNQUIST, J., dissenting).

As I state in the text, the *Lemon* test has been applied consistently in Establishment Clause cases since it was adopted in 1972. In a word, it has been the law. Respect for *stare decisis* should require us to follow *Lemon*. See *Garcia v. San Antonio Metro. Transit Auth.*, — U. S. —, — (1985) (POWELL, J., dissenting) ("The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitous overruling of multiple precedents . . . .").

ards that have proven useful in analyzing case after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted. Only once since our decision in *Lemon*, *supra*, have we addressed an Establishment Clause issue without resort to its three-pronged test. See *Marsh* v. *Chambers*, 463 U. S. 783 (1983).[4] *Lemon*, *supra*, has not been overruled or its test modified. Yet, continued criticism of it could encourage other courts to feel free to decide Establishment Clause cases on an *ad hoc* basis.[5]

The first inquiry under *Lemon* is whether the challenged statute has a "secular legislative purpose." *Lemon* v. *Kurtzman*, *supra*, at 612 (1971). As JUSTICE O'CONNOR recognizes, this secular purpose must be "sincere"; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a "sham." *Post*, at 10 (O'CONNOR, J., concurring in the judgment). In *Stone* v. *Graham*, 449 U. S. 39 (1980) *(per curiam)*, for example, we held that a statute requiring the posting of the Ten Commandments in public schools violated the Establishment Clause, even though the Kentucky legislature asserted that its goal was educational. We have not interpreted the first prong of *Lemon, supra*, however, as requiring that a statute have "exclusively secular" objectives.* *Lynch* v. *Donnelley*, — U. S. —, — n. 6. If such a requirement existed, much conduct and legislation approved by this Court in the past would have been invalidated. See, *e. g.*, *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970) (New York's property tax exemption for religious organizations upheld); *Everson* v. *Bd. of Education*, 330 U. S. 1 (1947) (holding that a township may reimburse parents for the cost of transporting their children to parochial schools).

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[4] In *Marsh* v. *Chambers*, 463 U. S. 783 (1983), we held that the Nebraska Legislature's practice of opening each day's session with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. Our holding was based upon the historical acceptance of the practice, that had become "part of the fabric of our society." *Id.*, at ——.

[5] *Lemon* v. *Kurtzman*, 403 U. S. 602 (1972), was a carefully considered opinion of the Chief Justice, in which he was joined by six other Justices. *Lemon*'s three-pronged test has been repeatedly followed. In *Comm. of Public Education* v. *Nyquist*, 413 U. S. 756 (1974), for example, the Court applied the "now well defined three part test" of *Lemon*. *Id.*, at ——.

In *Lynch* v. *Donnelly*, —— U. S. —— (1984), we said that the Court is not "confined to any single test or criterion in this sensitive area." *Id.*, at ——. The decision in *Lynch*, like that in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), was based primarily on the long historical practice of including religious symbols in the celebration of Christmas. Nevertheless, the Court, without any criticism of *Lemon*, applied its three-pronged test to the facts of that case. It focused on the "question whether there is a secular purpose for [the] display of the crèche." *Id.*, at ——.

The record before us, however, makes clear that Alabama's purpose was solely religious in character. Senator Donald Holmes, the sponsor of the bill that became Alabama Code § 16-1—20.1, freely acknowledged that the purpose of this statute was "to return voluntary prayer" to the public schools. See *ante*, at 18, n. 43. I agree with JUSTICE O'CONNOR that a single legislator's statement, particularly if made following enactment, is not necessarily sufficient to establish purpose. See *post*, at 11 (O'CONNOR, J., concurring in the judgment). But, as noted in the Court's opinion, the religious purpose of § 16-1—20.1 is manifested in other evidence, including the sequence and history of the three Alabama statutes. See *ante*, at 19.

I also consider it of critical importance that neither the District Court nor the Court of Appeals found a secular purpose, while both agreed that the purpose was to advance religion. In its first opinion (enjoining the enforcement of § 16-1—20.1 pending a hearing on the merits), the District Court said that the statute did "not reflect a clearly secular purpose."

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*The Court's opinion recognizes that "a statute motivated in part by a religious purpose may satisfy the first criterion." *Ante*, at 17. The Court simply holds that "a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion." *Ibid.* (emphasis added).

Jaffree v. *James*, 544 F. Supp. 727, 732 (SD Ala. 1982). Instead, the District Court found that the enactment of the statute was an "effort on the part of the State of Alabama to encourage a religious activity."[7] *Ibid.* The Court of Appeals likewise applied the *Lemon* test and found "a lack of secular purpose on the part of the Alabama legislature." *Jaffree* v. *Wallace*, 705 F. 2d 1526, 1535 (CA11 1983). It held that the objective of § 16–1—20.1 was the "advancement of religion." *Ibid.* When both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one.

I would vote to uphold the Alabama statute if it also had a clear secular purpose. See *Mueller* v. *Allen*, — U. S. —, — (1983) (the Court is "reluctan[t] to attribute unconstitutional motives to the state, particularly when a plausible secular purpose may be discerned from the face of the statute"). Nothing in the record before us, however, identifies a clear secular purpose, and the State also has failed to identify any non-religious reason for the statute's enactment.[8] Under these circumstances, the Court is required by our precedents to hold that the statute fails the first prong of the *Lemon* test and therefore violates the Establishment Clause.

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[7] In its subsequent decision on the merits, the District Court held that prayer in the public schools—even if led by the teacher—did not violate the Establishment Clause of the First Amendment. The District Court recognized that its decision was inconsistent with *Engle* v. *Vitale*, 370 U. S. 421 (1962), and other decisions of this Court. The District Court nevertheless ruled that its decision was justified because "the United States Supreme Court has erred . . . ." *Jaffree* v. *Bd. of School Comm'rs*, 554 F. Supp 1104 (S. D. Ala. 1983).

In my capacity as Circuit Justice, I stayed the judgment of the District Court pending appeal to the Court of Appeals for the Eleventh Circuit. *Jaffree* v. *Bd. of School Comm'rs*, — U. S. — (1983) (POWELL, J., in chambers).

[8] Instead, the State criticizes the *Lemon* test and asserts that "the principal problem [with the test] stems from the purpose prong." See Brief of Appellant George C. Wallace, p. 9 *et seq.*

Although we do not reach the other two prongs of the *Lemon* test, I note that the "effect" of a straightforward moment-of-silence statute is unlikely to "advanc[e] or inhibi[t] religion."* See *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968). Nor would such a statute "foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman*, *supra*, at 612–613, quoting *Walz* v. *Tax Commissioner*, 397 U. S. 664, 674 (1970).

I join the opinion and judgment of the Court.

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*If it were necessary to reach the "effects" prong of *Lemon*, we would be concerned primarily with the effect on the minds and feelings of immature pupils. As JUSTICE O'CONNOR notes, during "a moment of silence a student who objects to prayer [even where prayer may be the purpose] is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others." *Post*, at 7 (O'CONNOR, J., concurring in the judgment). Given the types of subjects youthful minds are primarily concerned with, it is unlikely that many children would use a simple "moment of silence" as a time for religious prayer. There are too many other subjects on the mind of the typical child. Yet there also is the likelihood that some children, raised in strongly religious families, properly would use the moment to reflect on the religion of his or her choice.

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 and 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE
OF ALABAMA, ET AL., APPELLANTS
83-812 v.
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 v.
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE O'CONNOR, concurring in the judgment.

Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the school day. Alabama has facilitated voluntary silent prayers of students who are so inclined by enacting Ala. Code § 16-1-20, which provides a moment of silence in appellees' schools each day. The parties to these proceedings concede the validity of this enactment. At issue in these appeals is the constitutional validity of an additional and subsequent Alabama statute, Ala. Code § 16-1-20.1, which both the District Court and the Court of Appeals concluded was enacted solely to officially encourage prayer during the moment of silence. I agree with the judgment of the Court that, in light of the findings of the Courts below and the history of its enactment, § 16-1-20.1 of the Alabama Code violates the Establishment Clause of the First Amendment. In my view, there can be little doubt that the purpose and likely effect of this subsequent enactment is to endorse and sponsor voluntary prayer in the public schools. I write separately to identify the peculiar features of the Alabama law that render it invalid, and to explain why moment of silence laws in other States do not necessarily manifest the same infirmity. I also write to explain why neither history nor the Free Exercise Clause of the First Amendment validate the Alabama law struck down by the Court today.

I

The religion clauses of the First Amendment, coupled with the Fourteenth Amendment's guaranty of ordered liberty, preclude both the Nation and the States from making any law respecting an establishment of religion or prohibiting the free exercise thereof. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). Although a distinct jurisprudence has enveloped each of these clauses, their common purpose is to secure religious liberty. See *Engle* v. *Vitale*, 370 U. S. 421, 430 (1962). On these principles the Court has been and remains unanimous.

As this case once again demonstrates, however, "it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application." *Walz* v. *Tax Comm'n*, 397 U. S. 664, 694 (1970) (opinion of Harlan, J.). It once appeared that the Court had developed a workable standard by which to identify impermissible government establishments of religion. See *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). Under the now familiar *Lemon* test, statutes must have both a secular legislative purpose and a principal or primary effect that neither advances nor inhibits religion, and in addition they must not foster excessive government entanglement with religion. *Id.*, at 612–613. Despite its initial promise, the *Lemon* test has proven problematic. The required inquiry into "entanglement" has been modified and questioned, see *Mueller* v. *Allen*, 463 U. S. 388, 403 n. 11 (1983), and in one case we have upheld state action against an Establishment Clause challenge without applying the *Lemon* test at all. *Marsh* v. *Chambers*, 463 U. S. 783 (1983). The author of *Lemon* himself apparently questions the test's general applicability. See *Lynch* v. *Donnelly*, 465 U. S. ——, —— (1984). JUSTICE REHNQUIST today suggests that we abandon *Lemon* entirely, and in the process limit the reach of the Establishment Clause to state discrimination between sects and government designation of a particular church as a "state" or "national" one. *Post*, at ——.

Perhaps because I am new to the struggle, I am not ready to abandon all aspects of the *Lemon* test. I do believe, however, that the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment. We must strive to do more than erect a constitutional "signpost," *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973), to be followed or ignored in a particular case as our predilections may dictate. Instead, our goal should be "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems." Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 332–333 (1963) (footnotes omitted). Last Term, I proposed a refinement of the *Lemon* test with this goal in mind. *Lynch* v. *Donnelly*, 465 U. S., at —— (concurring opinion).

The *Lynch* concurrence suggested that the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.*, at ——. Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.

The endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect. In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of Government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.

The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engle v. Vitale*, 370 U. S., at 431. At issue today is whether state moment of silence statutes in general, and Alabama's moment of silence statute in particular, embody an impermissible endorsement of prayer in public schools.

A

Twenty-five states permit or require public school teachers to have students observe a moment of silence in their classrooms.[1] A few statutes provide that the moment of silence is for the purpose of meditation alone. See Ariz. Rev. Stat. Ann. § 15-522 (1984); Conn. Gen. Stat. § 10-16a (1983); R. I. Gen. Laws § 16-12-3.1 (1981). The typical statute, however, calls for a moment of silence at the beginning of the school day during which students may meditate, pray, or reflect on the activities of the day. See, *e. g.*, Ark. Stat. Ann. § 80-1607.1 (1980); Ga. Code Ann. § 20-2-1050 (1982); Ill. Rev. Stat. ch. 122, ¶ 771 (1983); Ind. Code § 20-10.1-7-11 (1982); Kan. Stat. Ann. § 72-5308a (1980); Pa. Stat. Ann., Tit. 24, § 15-1516.1 (Purdon Supp. 1984). Federal trial courts have divided on the constitutionality of these moment of silence laws. Compare *Gaines* v. *Anderson*, 421 F. Supp. 337 (Mass. 1976) (upholding statute) with *May* v. *Cooperman*, 572 F. Supp. 1561 (NJ 1983) (striking down statute); *Duffy* v. *Las Cruces Public Schools*, 557 F. Supp. 1013 (NM 1983) (same); and *Beck* v. *McElrath*, 548 F. Supp. 1161 (MD Tenn.

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[1] See Ala. Code §§ 16-1-20, 16-1-20.1 (Supp. 1984); Ariz. Rev. Stat. Ann. § 15-522 (1984); Ark. Stat. Ann. § 80-1607.1 (1980); Conn. Gen. Stat. § 10-16a (1983); Del. Code Ann., Tit. 14, § 4101 (1981) (as interpreted in Del. Op. Atty. Gen. 79-I011 (1979)); Fla. Stat. § 233.062 (1983); Ga. Code Ann. § 20-2-1050 (1982); Ill. Rev. Stat., ch. 122, ¶ 771 (1983); Ind. Code § 20-10.1-7-11 (1982); Kan. Stat. Ann. § 72-5308a (1980); La. Rev. Stat. Ann. § 17:2115(A) (West 1982); Me. Rev. Stat. Ann., Tit. 20-A, § 4805 (1983); Md. Educ. Code Ann. § 7-104 (1985); Mass. Gen. Laws Ann., ch. 71, § 1A (1982); Mich. Comp. Laws Ann. § 380.1565 (Supp. 1984-1985); N. J. Stat. Ann. § 18A:36-4 (West Supp. 1984-1985); N. M. Stat. Ann. § 22-5-4.1 (1981); N. Y. Educ. Law § 3029-a (McKinney 1981); N. D. Cent. Code § 15-47-30.1 (1981); Ohio Rev. Code Ann. § 3313.60.1 (1980); Pa. Stat. Ann., Tit. 24, § 15-1516.1 (Purdon Supp. 1984-1985); R. I. Gen. Laws § 16-12-3.1 (1981); Tenn. Code Ann. § 49-6-1004 (1983); Va. Code § 22.1-203 (1980); W. Va. Const., Art. III, § 15-a. For a useful comparison of the provisions of many of these statutes, see Note, Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N. Y. U. L. Rev. 364, 407-408 (1983).

1982) (same). See also *Walter v. West Virginia Board of Education*, Civ. Action No. 84-5366 (SD W. Va., Mar. 14, 1985) (striking down state constitutional amendment). Relying on this Court's decisions disapproving vocal prayer and Bible reading in the public schools, see *Abington School District v. Schempp*, 374 U. S. 203 (1963), *Engle v. Vitale*, *supra*, the courts that have struck down the moment of silence statutes generally conclude that their purpose and effect is to encourage prayer in public schools.

The *Engle* and *Abington* decisions are not dispositive on the constitutionality of moment of silence laws. In those cases, public school teachers and students led their classes in devotional exercises. In *Engle*, a New York statute required teachers to lead their classes in a vocal prayer. The Court concluded that "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." 370 U. S., at 425. In *Abington*, the Court addressed Pennsylvania and Maryland statutes that authorized morning Bible readings in public schools. The Court reviewed the purpose and effect of the statutes, concluded that they required religious exercises, and therefore found them to violate the Establishment Clause. 374 U. S., at 223–224. Under all of these statutes, a student who did not share the religious beliefs expressed in the course of the exercise was left with the choice of participating, thereby compromising the nonadherent's beliefs, or withdrawing, thereby calling attention to his or her non-conformity. The decisions acknowledged the coercion implicit under the statutory schemes, see *Engle*, *supra*, at 431, but they expressly turned only on the fact that the government was sponsoring a manifestly religious exercise.

A state sponsored moment of silence in the public schools is different from state sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading. Scholars and at least one member of this Court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional. See *Abington*, *supra*, at 281 (BRENNAN, J., concurring) ("[T]he observance of a moment of reverent silence at the opening of class" may serve "the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and goverment"); L. Tribe, American Constitutional Law § 14–6, p. 829 (1978); P. Freund, The Legal Issue, in Religion and the Public Schools 23 (1965); Choper, 47 Minn. L. Rev., at 371; Kauper, Prayer, Public Schools, and the Supreme Court, 61 Mich. L. Rev. 1031, 1041 (1963). As a general matter, I agree. It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren.

By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period. Cf. *Widmar* v. *Vincent*, 454 U. S. 263, 272, n. 11 (1981) ("by creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there"). Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives. Nonetheless, it is also possible that a moment of silence statute, either as drafted or as actually implemented, could effectively favor the child who prays over the child who does not. For example, the message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray. Similarly, the face of the statute or its legislative history may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined. The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer.[illegible] This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion. *Lynch*, 465 U. S., at —— (concurring opinion) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion").

Before reviewing Alabama's moment of silence law to determine whether it endorses prayer, some general observations on the proper scope of the inquiry are in order. First, the inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited. See *Everson* v. *Board of Education*, 330 U. S. 1, 6 (1947) (courts must exercise "the most extreme caution" in assessing whether a state statute has a proper public purpose). In

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[illegible] Appellants argue that *Zorach* v. *Clauson*, 343 U. S. 306, 313–314 (1952) suggests there is no constitutional infirmity in a State's encouraging a child to pray during a moment of silence. The cited dicta from *Zorach*, however, is inapposite. There the Court stated that "When the state encourages religious instruction . . . *by adjusting the schedule of public events to sectarian needs*, it follows the best of our traditions." *Ibid.* (emphasis added). When the State provides a moment of silence during which prayer may occur at the election of the student, it can be said to be adjusting the schedule of public events to sectarian needs. But when the State also encourages the student to pray during a moment of silence, it converts an otherwise inoffensive moment of silence into an effort by the majority to use the machinery of the State to encourage the minority to participate in a religious exercise. See *Abington School District* v. *Schempp*, 374 U. S. 203, 226 (1963).

determining whether the government intends a moment of silence statute to convey a message of endorsement or disapproval of religion, a court has no license to psychoanalyze the legislators. See *McGowan* v. *Maryland*, 366 U. S. 420, 466 (1961) (opinion of Frankfurter, J.). If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history,[3] or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence,[4] then courts should generally defer to that stated intent. See *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 773 (1973); *Tilton* v. *Richardson*, 403 U. S. 672, 678–679 (1971). It is particularly troublesome to denigrate an expressed secular purpose due to post-enactment testimony by particular legislators or by interested persons who witnessed the drafting of the statute. Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief "was and is the law's reason for existence." *Epperson* v. *Arkansas*, 393 U. S. 97, 108 (1968). Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

JUSTICE REHNQUIST suggests that this sort of deferential inquiry into legislative purpose "means little," because "it only requires the legislature to express any secular purpose and omit all sectarian references." *Post*, at ——. It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the

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[3] See, *e. g.*, Tenn. Code Ann. § 49–6–1004 (1983).

[4] See, *e. g.*, W. Va. Const., Art. III, § 15–a.

Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice. It is of course possible that a legislature will enunciate a sham secular purpose for a statute. I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an expressed secular purpose is in doubt. While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share. In this sense the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce.

Second, the *Lynch* concurrence suggested that the effect of a moment of silence law is not entirely a question of fact:

> "[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts." 465 U. S., at —— (concurring opinion).

The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools. Cf. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. ——, —— n. 1 (REHNQUIST, J., dissenting) (noting that questions whether fighting words are "likely to provoke the *average* person to retaliation," *Street* v. *New York*, 394 U. S. 576, 592 (1969), and whether allegedly obscene material appeals to "prurient interests," *Miller* v. *California*, 413 U. S. 15, 24 (1973), are mixed questions of law and fact that are properly subject to *de novo* appellate review). A moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass this test.

B

The analysis above suggests that moment of silence laws in many States should pass Establishment Clause scrutiny because they do not favor the child who chooses to pray during a moment of silence over the child who chooses to meditate or reflect. Alabama Code § 16-1-20.1 (Supp. 1984) does not stand on the same footing. However deferentially one examines its text and legislative history, however objectively one views the message attempted to be conveyed to the public, the conclusion is unavoidable that the purpose of the statute is to endorse prayer in public schools. I accordingly agree with the Court of Appeals, 705 F. 2d 1526, 1535 (1983), that the Alabama statute has a purpose which is in violation of the Establishment Clause, and cannot be upheld.

In finding that the purpose of Alabama Code § 16-1-20.1 is to endorse voluntary prayer during a moment of silence, the Court relies on testimony elicited from State Senator Donald G. Holmes during a preliminary injunction hearing. *Ante*, at ——. Senator Holmes testified that the sole purpose of the statute was to return voluntary prayer to the public schools. For the reasons expressed above, I would give little, if any, weight to this sort of evidence of legislative intent. Nevertheless, the text of the statute in light of its official legislative history leaves little doubt that the purpose of this statute corresponds to the purpose expressed by Senator Holmes at the preliminary injunction hearing.

First, it is notable that Alabama already had a moment of silence statute before it enacted § 16-1-20.1. See Ala. Code § 16-1-20, reprinted *ante*, at ——, n. 1. Appellees do not challenge this statute—indeed, they concede its validity. See Brief for Appellees 2. The only significant addition made by Alabama Code § 16-1-20.1 is to specify expressly that voluntary prayer is one of the authorized activities during a moment of silence. Any doubt as to the legislative purpose of that addition is removed by the official legislative history. The sole purpose reflected in the official history is "to return voluntary prayer to our public schools." App. 50. Nor does anything in the legislative history contradict an intent to encourage children to choose prayer over other alternatives during the moment of silence. Given this legislative history, it is not surprising that the State of Alabama conceded in the courts below that the purpose of the statute was to make prayer part of daily classroom activity, and that both the District Court and the Court of Appeals concluded that the law's purpose was to encourage religious activity. See *ante*, at ——, n. 44. In light of the legislative history and the findings of the courts below, I agree with the Court that the State intended Alabama Code § 16-1-20.1 to convey a message that prayer was the endorsed activity during the state-prescribed moment of silence.[5] While it is therefore unnecessary also to determine the effect of the statute, *Lynch*, 465 U. S., at —— (concurring opinion), it also seems likely that the message actually conveyed to objective observers by Alabama Code § 16-1-20.1 is approval of the child who selects prayer over other alternatives during a moment of silence.

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[5] THE CHIEF JUSTICE suggests that one consequence of the Court's emphasis on the difference between § 16-1-20.1 and its predecessor statute might be to render the Pledge of Allegiance unconstitutional because Congress amended it in 1954 to add the words "under God." *Post*, at ——. I disagree. In my view, the words "under God" in the Pledge, as codified at 36 U. S. C. § 172, serve as an acknowledgement of religion with "the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future." *Lynch*, 465 U. S., at —— (concurring opinion).

I also disagree with THE CHIEF JUSTICE's suggestion that the Court's opinion invalidates any moment of silence statute that includes the word "prayer." *Post*, at ——. As noted *infra*, at ——, "[e]ven if a statute specifies that a student may choose to pray during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives."

Given this evidence in the record, candor requires us to admit that this Alabama statute was intended to convey a message of state encouragement and endorsement of religion. In *Walz* v. *Tax Comm'n*, 397 U. S., at 669, the Court stated that the religion clauses of the First Amendment are flexible enough to "permit religious exercise to exist without sponsorship and without interference." Alabama Code § 16-1-20.1 does more than permit prayer to occur during a moment of silence "without interference." It endorses the decision to pray during a moment of silence, and accordingly sponsors a religious exercise. For that reason, I concur in the judgment of the Court.

II

In his dissenting opinion, *post*, at ——, JUSTICE REHNQUIST reviews the text and history of the First Amendment religion clauses. His opinion suggests that a long line of this Court's decisions are inconsistent with the intent of the drafters of the Bill of Rights. He urges the Court to correct the historical inaccuracies in its past decisions by embracing a far more restricted interpretation of the Establishment Clause, an interpretation that presumably would permit vocal group prayer in public schools. See generally R. Cord, Separation of Church and State (1982).

The United States, in an *amicus* brief, suggests a less sweeping modification of Establishment Clause principles. In the Federal Government's view, a state sponsored moment of silence is merely an "accommodation" of the desire of some public school children to practice their religion by praying silently. Such an accommodation is contemplated by the First Amendment's guaranty that the Government will not prohibit the free exercise of religion. Because the moment of silence implicates free exercise values, the United States suggests that the *Lemon*-mandated inquiry into purpose and effect should be modified. Brief for United States as *Amicus Curiae* 22.

There is an element of truth and much helpful analysis in each of these suggestions. Particularly when we are interpreting the Constitution, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). Whatever the provision of the Constitution that is at issue, I continue to believe that "fidelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when [the provision] was adopted are now constitutionally impermissible." *Tennessee* v. *Garner*, 471 U. S. ——, —— (1985) (dissenting opinion). The Court properly looked to history in upholding legislative prayer, *Marsh* v. *Chambers*, 463 U. S. 783 (1983), property tax exemptions for houses of worship, *Walz* v. *Tax Comm'n*, *supra*, and Sunday closing laws, *McGowan* v. *Maryland*, 366 U. S. 420 (1961). As Justice Holmes once observed, "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922).

JUSTICE REHNQUIST does not assert, however, that the drafters of the First Amendment expressed a preference for prayer in public schools, or that the practice of prayer in public schools enjoyed uninterrupted government endorsement from the time of enactment of the Bill of Rights to the present era. The simple truth is that free public education was virtually non-existent in the late eighteenth century. See *Abington*, 374 U. S., at 238, and n. 7 (BRENNAN, J., concurring). Since there then existed few government-run schools, it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools. Sky, The Establishment Clause, the Congress, and the Schools: An Historical Perspective, 52 Va. L.

Rev. 1395, 1403–1404 (1966). Even at the time of adoption of the Fourteenth Amendment, education in Southern States was still primarily in private hands, and the movement toward free public schools supported by general taxation had not taken hold. *Brown* v. *Board of Education*, 347 U. S. 483, 489–490 (1954).

This uncertainty as to the intent of the Framers of the Bill of Rights does not mean we should ignore history for guidance on the role of religion in public education. The Court has not done so. See, *e. g.*, *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 212 (1948) (Frankfurter, J., concurring). When the intent of the Framers is unclear, I believe we must employ both history and reason in our analysis. The primary issue raised by JUSTICE REHNQUIST's dissent is whether the historical fact that our Presidents have long called for public prayers of Thanks should be dispositive on the constitutionality of prayer in public schools.[*] I think not. At the very least, Presidential proclamations are distinguishable from school prayer in that they are received in a non-coercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs. See, *e. g.*, *Marsh* v. *Chambers*, *supra*, at ——; *Tilton* v. *Richardson*, 403 U. S., at 686. Although history provides a touchstone for constitutional problems, the Establishment Clause concern for religious liberty is dispositive here.

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[*] Even assuming a taxpayer could establish standing to challenge such a practice, see *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982), these Presidential proclamations would probably withstand Establishment Clause scrutiny given their long history. See *Marsh* v. *Chambers*, 463 U. S. 783 (1983).

The element of truth in the United States' arguments, I believe, lies in the suggestion that Establishment Clause analysis must comport with the mandate of the Free Exercise Clause that government make no law prohibiting the free exercise of religion. Our cases have interpreted the Free Exercise Clause to compel the Government to exempt persons from some generally applicable government requirements so as to permit those persons to freely exercise their religion. See, *e. g.*, *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Sherbert* v. *Verner*, 374 U. S. 398 (1963). Even where the Free Exercise Clause does not compel the Government to grant an exemption, the Court has suggested that the Government in some circumstances may voluntarily choose to exempt religious observers without violating the Establishment Clause. See, *e. g.*, *Gillette* v. *United States*, 401 U. S. 437, 453 (1971); *Braunfeld* v. *Brown*, 366 U. S. 599 (1961). The challenge posed by the United States' argument is how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion. On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an "accommodation" of free exercise rights. Indeed, the statute at issue in *Lemon*, which provided salary supplements, textbooks, and instructional materials to Pennsylvania parochial schools, can be viewed as an accommodation of the religious beliefs of parents who choose to send their children to religious schools.

It is obvious that the either of the two Religion Clauses, "if expanded to a logical extreme, would tend to clash with the other." *Walz*, 397 U. S., at 668–669. The Court has long exacerbated the conflict by calling for government "neutrality" toward religion. See, *e. g.*, *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973), *Board of Education* v. *Allen*, 392 U. S. 236 (1968). It is difficult to square any notion of "complete neutrality," *ante*, at ——, with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not neutral toward religion. See *Welsh* v. *United States*, 398 U. S. 333, 372 (1970) (WHITE, J., dissenting).

The solution to the conflict between the religion clauses lies not in "neutrality," but rather in identifying workable limits to the Government's license to promote the free exercise of religion. The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues free exercise clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the "objective observer," *ante*, at ——, is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

While this "accommodation" analysis would help reconcile our Free Exercise and Establishment Clause standards, it would not save Alabama's moment of silence law. If we assume that the religious activity that Alabama seeks to protect is silent prayer, then it is difficult to discern any state-imposed burden on that activity that is lifted by Alabama Code § 16-1-20.1. No law prevents a student who is so inclined from praying silently in public schools. Moreover, state law already provided a moment of silence to these appellees irrespective of Alabama Code § 16-1-20.1. See Ala. Code § 16-1-20. Of course, the State might argue that § 16-1-20.1 protects not silent prayer, but rather group silent prayer under State sponsorship. Phrased in these terms, the burden lifted by the statute is not one imposed by the State of Alabama, but by the Establishment Clause as interpreted in *Engle* and *Abington*. In my view, it is beyond the authority of the State of Alabama to remove burdens imposed by the Constitution itself. I conclude that the Alabama statute at issue today lifts no state-imposed burden on the free exercise of religion, and accordingly cannot properly be viewed as an accommodation statute.

III

The Court does not hold that the Establishment Clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer. To the contrary, the moment of silence statutes of many States should satisfy the Establishment Clause standard we have here applied. The Court holds only that Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer.

This line may be a fine one, but our precedents and the principles of religious liberty require that we draw it. In my view, the judgment of the Court of Appeals must be affirmed.

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 and 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83-812 v.
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ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

CHIEF JUSTICE BURGER, dissenting.

Some who trouble to read the opinions in this case will find it ironic—perhaps even bizarre—that on the very day we heard arguments in this case, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, the House of Representatives and the Senate regularly open each session with a prayer. These legislative prayers are not just one minute in duration, but are extended, thoughtful invocations and prayers for Divine guidance. They are given, as they have been since 1789, by clergy appointed as official Chaplains and paid from the Treasury of the United States. Congress has also provided chapels in the Capitol, at public expense, where Members and others may pause for prayer, meditation—or a moment of silence.

Inevitably some wag is bound to say that the Court's holding today reflects a belief that the historic practice of the Congress and this Court is justified because members of the Judiciary and Congress are more in need of Divine guidance than are schoolchildren. Still others will say that all this controversy is "much ado about nothing," since no power on earth—including this Court and Congress—can stop any teacher from opening the school day with a moment of silence for pupils to meditate, to plan their day—or to pray if they voluntarily elect to do so.

I make several points about today's curious holding.

(a) It makes no sense to say that Alabama has "endorsed prayer" by merely enacting a new statute "to specify expressly that voluntary prayer is *one* of the authorized activities during a moment of silence," *ante*, at 12 (O'CONNOR, J., concurring in the judgment) (emphasis added). To suggest that a moment-of-silence statute that includes the word "prayer" unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion. For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion. The Alabama legislature has no more "endorsed" religion than a state or the Congress does when it provides for legislative chaplains, or than this Court does when it opens each session with an invocation to God. Today's decision recalls the observations of Justice Goldberg:

> "[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."

School District v. *Schempp*, 374 U. S. 203, 306 (1963) (concurring opinion).

(b) The inexplicable aspect of the foregoing opinions, however, is what they advance as support for the holding concerning the purpose of the Alabama legislature. Rather than determining legislative purpose from the face of the statute as a whole,[1] the opinions rely on three factors in concluding that the Alabama legislature had a "wholly religious" purpose for enacting the statute under review, Ala. Code § 16-1-20.1 (Supp. 1984): (i) statements of the statute's sponsor, (ii) admissions in Governor James' Answer to the Second Amended Complaint, and (iii) the difference between § 16-1-20.1 and its predecessor statute.

Curiously, the opinions do not mention that *all* of the sponsor's statements relied upon—including the statement "inserted" into the Senate Journal—were made *after* the legislature had passed the statute; indeed, the testimony that the Court finds critical was given well over a year after the statute was enacted. As even the appellees concede, see Brief for Appellees 18, there is not a shred of evidence that the legislature as a whole shared the sponsor's motive or that a majority in either house was even aware of the sponsor's view of the bill when it was passed. The sole relevance of the sponsor's statements, therefore, is that they reflect the personal, subjective motives of a single legislator. No case in the 195-year history of this Court supports the disconcerting idea that post-enactment statements by individual legislators are relevant in determining the constitutionality of legislation.

Even if an individual legislator's after-the-fact statements could rationally be considered relevant, all of the opinions fail to mention that the sponsor also testified that one of his purposes in drafting and sponsoring the moment-of-silence bill was to clear up a widespread misunderstanding that a schoolchild is legally *prohibited* from engaging in silent, individual prayer once he steps inside a public school building. See App. 53-54. That testimony is at least as important as the statements the Court relies upon, and surely that testimony manifests a permissible purpose.

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[1] The foregoing opinions likewise completely ignore the statement of purpose that accompanied the moment-of-silence bill throughout the legislative process: "To permit a period of silence to be observed *for the purpose of meditation or voluntary prayer* at the commencement of the first class of each day in all public schools." 1981 Ala. Senate J. 14 (emphasis added). See also *id.*, at 150, 307, 410, 535, 556, 957.

The Court also relies on the admissions of Governor James' Answer to the Second Amended Complaint. Strangely, however, the Court neglects to mention that there was no trial bearing on the constitutionality of the Alabama statutes; trial became unnecessary when the District Court held that the Establishment Clause does not apply to the states.[3] The absence of a trial on the issue of the constitutionality of §16-1-20.1 is significant because the Answer filed by the State Board and Superintendent of Education did not make the same admissions that the Governor's Answer made. See 1 Record 187. The Court cannot know whether, if this case had been tried, those state officials would have offered evidence to contravene appellees' allegations concerning legislative purpose. Thus, it is completely inappropriate to accord any relevance to the admissions in the Governor's Answer.

The several preceding opinions conclude that the principal difference between §16-1-20.1 and its predecessor statute proves that the sole purpose behind the inclusion of the phrase "or voluntary prayer" in §16-1-20.1 was to endorse and promote prayer. This reasoning is simply a subtle way of focusing exclusively on the religious component of the statute rather than examining the statute as a whole. Such logic—if it can be called that—would lead the Court to hold, for example, that a state may enact a statute that provides reimbursement for bus transportation to the parents of all schoolchildren, but may not *add* parents of parochial school students to an existing program providing reimbursement for parents of public school students. Congress amended the statutory Pledge of Allegiance 31 years ago to add the words "under God." Act of June 14, 1954, Pub. L. 396, 68 Stat. 249. Do the several opinions in support of the judgment today render the Pledge unconstitutional? That would be the consequence of their method of focusing on the difference between § 16-1-20.1 and its predecessor statute rather than examining § 16-1-20.1 as a whole.[5] Any such holding would of course make a mockery of our decisionmaking in Establishment Clause cases. And even were the Court's method correct, the inclusion of the words "or voluntary prayer" in § 16-1-20.1 is wholly consistent with the clearly permissible purpose of clarifying that silent, voluntary prayer is not *forbidden* in the public school building.[6]

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[3] The four days of trial to which the Court refers concerned only the alleged practices of vocal, group prayer in the classroom.

(c) The Court's extended treatment of the "test" of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts." "In each [Establishment Clause] case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch* v. *Donnelly*, 465 U. S. ——, —— (1984). In any event, our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion. Given today's decision, however, perhaps it is understandable that the opinions in support of the judgment all but ignore the Establishment Clause itself and the concerns that underlie it.

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[5] The House Report on the legislation amending the Pledge states that the purpose of the amendment was to affirm the principle that "our people and our Government [are dependent] upon the moral directions of the Creator." H. R. Rep. No. 1693, 83d Cong., 2d Sess. 2, reprinted in 1954 U. S. Code Cong. & Admin. News 2339, 2340. If this is simply "acknowledgement," not "endorsement," of religion, see *ante*, at 12, n. 6 (O'CONNOR, J., concurring in the judgment), the distinction is far too infinitesimal for me to grasp.

[6] The several opinions suggest that other similar statutes may survive today's decision. See *ante*, at 20; *ante*, at 1-2 (POWELL, J., concurring); *ante*, at 12, n. 6 (O'CONNOR, J., concurring in the judgment). If this is true, these opinions become even less comprehensible, given that the Court holds this statute invalid when there is no legitimate evidence of "impermissible" purpose; there could hardly be less evidence of "impermissible" purpose than was shown in this case.

(d) The notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespass into, the ridiculous. The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes—as Congress does by providing chaplains and chapels. It accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray. The statute also provides a meaningful opportunity for schoolchildren to appreciate the absolute constitutional right of each individual to worship and believe as the individual wishes. The statute "endorses" only the view that the religious observances of others should be tolerated and, where possible, accommodated. If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the "benevolent neutrality" that we have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require.

The Court today has ignored the wise admonition of Justice Goldberg that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *School District v. Schempp*, 374 U. S. 203, 308 (1963) (concurring opinion). The innocuous statute that the Court strikes down does not even rise to the level of "mere shadow." JUSTICE O'CONNOR paradoxically acknowledges, "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." *Ante*, at 7.[5] I would add to that, "even if they choose to pray."

The mountains have labored and brought forth a mouse.[6]

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[5] The principal plaintiff in this action has stated "I probably wouldn't have brought the suit just on the silent meditation or prayer statute . . . . If that's all that existed, that wouldn't have caused me much concern, unless it was implemented in a way that suggested prayer was the preferred activity." Malone, Prayers for Relief, 71 A.B.A. J. 61, 62, col. 1 (Apr. 1985) (quoting Ishmael Jaffree).

[6] Horace, Epistles, bk. III (Ars Poetica), line 139.

SUPREME COURT OF THE UNITED STATES

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ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE WHITE, dissenting.

For the most part agreeing with the opinion of the Chief Justice, I dissent from the Court's judgment invalidating Alabama Code § 16-1-20.1. Because I do, it is apparent that in my view the First Amendment does not proscribe either (1) statutes authorizing or requiring in so many words a moment of silence before classes begin or (2) a statute that provides, when it is initially passed, for a moment of silence for meditation or prayer. As I read the filed opinions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer. But if a student asked whether he could pray during that moment, it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question "May I pray?" This is so even if the Alabama statute is infirm, which I do not believe it is, because of its peculiar legislative history.

I appreciate JUSTICE REHNQUIST's explication of the history of the religion clauses of the First Amendment. Against that history, it would be quite understandable if we undertook to reassess our cases dealing with these clauses, particularly those dealing with the Establishment Clause. Of course, I have been out of step with many of the Court's decisions dealing with this subject matter, and it is thus not surprising that I would support a basic reconsideration of our precedents.

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[June 4, 1985]

JUSTICE REHNQUIST, dissenting.

Thirty-eight years ago this Court, in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947) summarized its exegesis of Establishment Clause doctrine thus:

> "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds* v. *United States*, [98 U. S. 145, 164 (1879)]."

This language from *Reynolds*, a case involving the Free Exercise Clause of the First Amendment rather than the Establishment Clause, quoted from Thomas Jefferson's letter to the Danbury Baptist Association the phrase "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861).[1]

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly forty years. Thomas Jefferson was of course in France at the time the constitutional amendments known as the Bill of Rights were passed by Congress and ratified by the states. His letter to the Danbury Baptist Association was a short note of courtesy, written fourteen years after the amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

Jefferson's fellow Virginian James Madison, with whom he was joined in the battle for the enactment of the Virginia Statute of Religious Liberty of 1786, did play as large a part as anyone in the drafting of the Bill of Rights. He had two advantages over Jefferson in this regard: he was present in the United States, and he was a leading member of the First Congress. But when we turn to the record of the proceedings in the First Congress leading up to the adoption of the Establishment Clause of the Constitution, including Madison's significant contributions thereto, we see a far different picture of its purpose than the highly simplified "wall of separation between church and State."

During the debates in the thirteen colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general government carried with it a potential for tyranny. The typical response to this argument on the part of those who favored ratification was that the general government established by the Constitution had only delegated powers, and that these delegated powers were so limited that the government would have no occasion to violate individual liberties. This response satisfied some, but not others, and of the eleven colonies which ratified the Constitution by early 1789, five proposed one or another amendments guaranteeing individual liberty. Three—New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom. See 3 J. Elliot, Debates on the Federal Constitution 659 (1891); 1 id., at 328. Rhode Island and North Carolina flatly refused to ratify the Constitution in the absence of amendments in the nature of a Bill of Rights. 1 id., at 334; 4 at 244. Virginia and North Carolina proposed identical guarantees of religious freedom:

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[1] *Reynolds* is the only authority cited as direct precedent for the "wall of separation theory." 330 U. S., at 16. *Reynolds* is truly inapt; it dealt with a Mormon's *Free Exercise* Clause challenge to a federal polygamy law.

> "[A]ll men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others." 3 id., at 659; 4 id., at 244.[1]

On June 8, 1789, James Madison rose in the House of Representatives and "reminded the House that this was the day that he had heretofore named for bringing forward amendments to the Constitution." 1 Annals of Cong. 424. Madison's subsequent remarks in urging the House to adopt his drafts of the proposed amendments were less those of a dedicated advocate of the wisdom of such measures than those of a prudent statesman seeking the enactment of measures sought by a number of his fellow citizens which could surely do no harm and might do a great deal of good. He said, *inter alia*:

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[1] The New York and Rhode Island proposals were quite similar. They stated that no particular "religious sect or society ought to be favored or established by law in preference to others." 1 Elliot's Debates, at 328, id., at 334.

> "It appears to me that this House is bound by every motive of prudence, not to let the first session pass over without proposing to the State Legislatures, some things to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them. I wish, among other reasons why something should be done, that those who had been friendly to the adoption of this Constitution may have the opportunity of proving to those who were opposed to it that they were as sincerely devoted to liberty and a Republican Government, as those who charged them with wishing the adoption of this Constitution in order to lay the foundation of an aristocracy or despotism. It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired of such a nature as will not injure the Constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens, the friends of the Federal Government will evince that spirit of deference and concession for which they have hitherto been distinguished." *Id.*, at 431–432.

The language Madison proposed for what ultimately became the Religion Clauses of the First Amendment was this:

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.*, at 434.

On the same day that Madison proposed them, the amendments which formed the basis for the Bill of Rights were referred by the House to a committee of the whole, and after several weeks' delay were then referred to a Select Committee consisting of Madison and ten others. The Committee revised Madison's proposal regarding the establishment of religion to read:

> "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.*, at 729.

The Committee's proposed revisions were debated in the House on August 15, 1789. The entire debate on the Religion Clauses is contained in two full columns of the "Annals," and does not seem particularly illuminating. See *id.*, at 729-731. Representative Peter Sylvester of New York expressed his dislike for the revised version, because it might have a tendency "to abolish religion altogether." Representative John Vining suggested that the two parts of the sentence be transposed; Representative Elbridge Gerry thought the language should be changed to read "that no religious doctrine shall be established by law." *Id.*, at 729. Roger Sherman of Connecticut had the traditional reason for opposing provisions of a Bill or Rights—that Congress had no delegated authority to "make religious establishments"—and therefore he opposed the adoption of the amendment. Representative Daniel Carroll of Maryland thought it desirable to adopt the words proposed, saying "[h]e would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community."

Madison then spoke, and said that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.*, at 730. He said that some of the state conventions had thought that Congress might rely on the "necessary and proper" clause to infringe the rights of conscience or to establish a national religion, and "to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit." *Ibid.*

Representative Benjamin Huntington then expressed the view that the Committee's language might "be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it." Huntington, from Connecticut, was concerned that in the New England states, where state established religions were the rule rather than the exception, the federal courts might not be able to entertain claims based upon an obligation under the bylaws of a religious organization to contribute to the support of a minister or the building of a place of worship. He hoped that "the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronise those who professed no religion at all." *Id.*, at 730–731.

Madison responded that the insertion of the word "national" before the word "religion" in the Committee version should satisfy the minds of those who had criticized the language. "He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent." *Id.*, at 731. Representative Samuel Livermore expressed himself as dissatisfied with Madison's proposed amendment, and thought it would be better if the Committee language were altered to read that "Congress shall make no laws touching religion, or infringing the rights of conscience." *Ibid.*

Representative Gerry spoke in opposition to the use of the word "national" because of strong feelings expressed during the ratification debates that a federal government, not a national government, was created by the Constitution. Madison thereby withdrew his proposal but insisted that his reference to a "national religion" only referred to a national establishment and did not mean that the goverment was a national one. The question was taken on Representative Livermore's motion, which passed by a vote of 31 for and 20 against. *Ibid.*

The following week, without any apparent debate, the House voted to alter the language of the Religion Clause to read "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.*, at 766. The floor debates in the Senate were secret, and therefore not reported in the Annals. The Senate on September 3, 1789 considered several different forms of the Religion Amendment, and reported this language back to the House:

> "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."

C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment 130 (1964).

The House refused to accept the Senate's changes in the Bill of Rights and asked for a conference; the version which emerged from the conference was that which ultimately found its way into the Constitution as a part of the First Amendment.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The House and the Senate both accepted this language on successive days, and the amendment was proposed in this form.

On the basis of the record of these proceedings in the House of Representatives, James Madison was undoubtedly the most important architect among the members of the House of the amendments which became the Bill or Rights, but it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution. During the ratification debate in the Virginia Convention, Madison had actually opposed the idea of any Bill of Rights. His sponsorship of the amendments in the House was obviously not that of a zealous believer in the necessity of the Religion Clauses, but of one who felt it might do some good, could do no harm, and would satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights.[8] His original language "nor shall any national religion be established" obviously does not conform to the "wall of separation" between church and State idea which latter day commentators have ascribed to him. His explanation on the floor of the meaning of his language—"that Congress should not establish a religion, and enforce the legal observation of it by law" is of the same ilk. When he replied to Huntington in the debate over the proposal which came from the Select Committee of the House, he urged that the language "no religion shall be established by law" should be amended by inserting the word "national" in front of the word "religion."

It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion. Thus the Court's opinion in *Everson*—while correct in bracketing Madison and Jefferson together in their exertions in their home state leading to the enactment of the

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[8] In a letter he sent to Jefferson in France, Madison stated that he did not see much importance in a Bill of Rights but he planned to support it because it was "anxiously desired by others . . . [and] it might be of use, and if properly executed could not be of disservice." 5 Writings of James Madison 271 (G. Hunt ed. 1904).

Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.

The repetition of this error in the Court's opinion in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948), and, *inter alia*, *Engel* v. *Vitale*, 370 U. S. 421 (1962), does not make it any sounder historically. Finally, in *Abington School District* v. *Schempp*, 374 U. S. 203, 214 (1963) the Court made the truly remarkable statement that "the views of Madison and Jefferson, preceded by Roger Williams came to be incorporated not only in the Federal Constitution but likewise in those of most of our States" (footnote omitted). On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history.[4] And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history.

None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another, but it was definitely not concern about whether the Government might aid all religions evenhandedly. If one were to follow the advice of JUSTICE BRENNAN, concurring in *Abington School District* v. *Schempp*, *supra* at 236, and construe the Amendment in the light of what particular "practices . . . challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent," one would have to say that the First Amendment Establishment Clause should be read no more broadly than to prevent the establishment of a national religion or the governmental preference of one religious sect over another.

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[4] State establishments were prevalent throughout the late Eighteenth and early Nineteenth Centuries. See Massachusetts Constitution of 1780, Part 1, Art. III; New Hampshire Constitution of 1784, Art. VI; Maryland Declaration of Rights of 1776, Art. XXXIII; Rhode Island Charter of 1663 (superseded 1842).

The actions of the First Congress, which re-enacted the Northwest Ordinance for the governance of the Northwest Territory in 1789, confirm the view that Congress did not mean that the Government should be neutral between religion and irreligion. The House of Representatives took up the Northwest Ordinance on the same day as Madison introduced his proposed amendments which became the Bill of Rights; while at that time the Federal Government was of course not bound by draft amendments to the Constitution which had not yet been proposed by Congress, say nothing of ratified by the States, it seems highly unlikely that the House of Representatives would simultaneously consider proposed amendments to the Constitution and enact an important piece of territorial legislation which conflicted with the intent of those proposals. The Northwest Ordinance, 1 Stat. 50, reenacted the Northwest Ordinance of 1787 and provided that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.*, at 52, n.(a). Land grants for schools in the Northwest Territory were not limited to public schools. It was not until 1845 that Congress limited land grants in the new States and Territories to nonsectarian schools. 5 Stat. 788; Antieau, Downey, & Roberts, Freedom From Federal Establishment, at 163.

On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clause which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens of the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them." 1 Annals of Cong. 914 (1789). Representative Aedanas Burke objected to the resolution because he did not like "this mimicking of European customs"; Representative Thomas Tucker objected that whether or not the people had reason to be satisfied with the Constitution was something that the states knew better than the Congress, and in any event "it is a religious matter, and, as such, is proscribed to us." *Id.*, at 915. Representative Sherman supported the resolution "not only as a laudable one in itself, but as warranted by a number of precedents in Holy Writ: for instance, the solemn thanksgivings and rejoicings which took place in the time of Solomon, after the building of the temple, was a case in point. This example, he thought, worthy of Christian imitation on the present occasion . . . ." *Ibid.*

Boudinot's resolution was carried in the affirmative on September 25, 1789. Boudinot and Sherman, who favored the Thanksgiving proclamation, voted in favor of the adoption of the proposed amendments to the Constitution, including the Religion Clause; Tucker, who opposed the Thanksgiving proclamation, voted against the adoption of the amendments which became the Bill of Rights.

Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness." 1 J. Richardson, Messages and Papers of the Presidents, 1789-1897, p. 64 (1897). The Presidential proclamation was couched in these words:

> "Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.
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> "And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion

and virtue, and the increase of science among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best." *Ibid.*

George Washington, John Adams, and James Madison all issued Thanksgiving proclamations; Thomas Jefferson did not, saying:

> "Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it." 11 Writings of Thomas Jefferson 429 (A. Lipscomb ed. 1904).

As the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson's treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe's Roman Catholic priest and church.[9] It was not until 1897, when aid to sectarian

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[9] The Treaty stated in part:

"And whereas, the greater part of said Tribe have been baptized and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion . . . [a]nd . . . three hundred dollars, to assist the said Tribe in the erection of a church." 7 Stat. 79.

From 1789 to 1823 the U. S. Congress had provided a trust endowment of up to 12,000 acres of land "for the Society of the United Brethren for propagating the Gospel among the Heathen." See, e. g., ch. 46, 1 Stat. 490. The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson.

Congressional grants for the aid of religion were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. See 1 Stat. 257. In 1833 Congress authorized the State of Ohio to sell the land education for Indians had reached $500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. See Act of June 7, 1897, 30 Stat. 62, 79.; cf. *Quick Bear* v. *Leupp*, 210 U. S. 50, 77–79 (1908); J. O'Neill, Religion and Education Under the Constitution 118–119 (1949). See generally R. Cord, Separation of Church and State 61–82 (1982). This history shows the fallacy of the notion found in *Everson* that "no tax in any amount" may be levied for religious activities in any form. 330 U. S. at 15–16.

Joseph Story, a member of this Court from 1811 to 1845, and during much of that time a professor at the Harvard Law School, published by far the most comprehensive treatise on the United States Constitution that had then appeared. Volume 2 of Story's Commentaries on the Constitution of the United States 630–632 (5th ed. 1891) discussed the meaning of the Establishment Clause of the First Amendment this way:

> "Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.
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> . . . . .
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> "The real object of the [First] [A]mendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent

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set aside for religion and use the proceeds "for the support of religion . . . and for no other use or purpose whatsoever. . . ." 4 Stat. 618–619.

any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age. . . ." (Footnotes omitted.)

Thomas Cooley's eminence as a legal authority rivaled that of Story. Cooley stated in his treatise entitled Constitutional Limitations that aid to a particular religious sect was prohibited by the United States Constitution, but he went on to say:

> "But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or

sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse. . . ." *Id.*, at 470–471.

Cooley added that,

> "[t]his public recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of state policy which induce the government to aid institutions of charity and seminaries of instruction will incline it also to foster religious worship and religious institutions, as conservators of the public morals and valuable, if not indispensable, assistants to the preservation of the public order." *Id.*, at 470.

It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. Indeed, the first American dictionary defined the word "establishment" as "the act of establishing, founding, ratifying or ordainin(g,") such as in "[t]he episcopal form of religion, so called, in England." 1 N. Webster, American Dictionary of the English Language (1st ed. 1828). The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

Notwithstanding the absence of an historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson* our Establishment Clause cases have been neither princpled nor unified. Our recent opinions, many of them hopelessly divided pluralities,[6] have with embarassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." *Lemon* v. *Kurtzman*, 403 U. S. 602, 614 (1971); *Tilton* v. *Richardson*, 403 U. S. 672, 677-678, (1971); *Wolman* v. *Walter*, 433 U. S. 229, 236 (1977); *Lynch* v. *Donnelly*, 465 U. S. ——, (1984).

Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proven all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey* v. *Third Avenue R. Co.*, 244 N. Y. 84, 94, 155 N. E. 58, 61 (1926).

But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The "crucible of litigation," ante at 14, is well adapted to adjudicating factual disputes on the basis of testimony presented in court, but no amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

The Court has more recently attempted to add some mortar to *Everson's* wall through the three-part test of *Lemon* v.

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[6] *Tilton* v. *Richardson* 403 U. S. 672, 677 (1971); *Meek* v. *Pittenger*, 421 U. S. 349 (1975) (partial); *Roemer* v. *Board of Public Works of Maryland*, 426 U. S. 736 (1976); *Wolman* v. *Walter*, 433 U. S. 229 (1977).

Many of our other Establishment Clause cases have been decided by bare 5-4 majorities. *Committee for Public Education* v. *Regan*, 444 U. S. 646 (1980); *Larson* v. *Valente*, 456 U. S. 228 (1982); *Mueller* v. *Allen*, 463 U. S. 388 (1983); *Lynch* v. *Donnelly*, 465 U. S. —— (1984); *cf.* *Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1973).

Kurtzman, *supra*, at 614–615, which served at first to offer a more useful test for purposes of the Establishment Clause than did the "wall" metaphor. Generally stated, the *Lemon* test proscribes state action that has a sectarian purpose or effect, or causes an impermissible governmental entanglement with religion. *E. g.*, *Lemon*, *supra*.

Lemon cited *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968), as the source of the "purpose" and "effect" prongs of the three-part test. The *Allen* opinion explains, however, how it inherited the purpose and effect elements from *Schempp* and *Everson*, both of which contain the historical errors described above. See *Allen*, *supra*, at 243. Thus the purpose and effect prongs have the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters.

The secular purpose prong has proven mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate. If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus the constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out. The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references, because legislators might do just that. Faced with a valid legislative secular purpose, we could not properly ignore that purpose without a factual basis for doing so. *Larson* v. *Valente*, 456 U. S. 228, 262–263 (1982) (WHITE, J., dissenting).

However, if the purpose prong is aimed to void all statutes enacted with the intent to aid sectarian institutions, whether stated or not, then most statutes providing any aid, such as textbooks or bus rides for sectarian school children, will fail because one of the purposes behind every statute, whether stated or not, is to aid the target of its largesse. In other words, if the purpose prong requires an absence of *any* intent to aid sectarian institutions, whether or not expressed, few state laws in this area could pass the test, and we would be required to void some state aids to religion which we have already upheld. *E. g., Allen, supra.*

The entanglement prong of the *Lemon* test came from *Walz* v. *Tax Commission*, 397 U. S. 664, 674 (1970). *Walz* involved a constitutional challenge to New York's time-honored practice of providing state property tax exemptions to church property used in worship. The *Walz* opinion refused to "undermine the ultimate constitutional objective [of the Establishment Clause] as illuminated by history," *id.*, at 671, and upheld the tax exemption. The Court examined the historical relationship between the state and church when church property was in issue, and determined that the challenged tax exemption did not so entangle New York with the Church as to cause an intrusion or interference with religion. Interferences with religion should arguably be dealt with under the Free Excercise Clause, but the entanglement inquiry in *Walz* was consistent with that case's broad survey of the relationship between state taxation and religious property.

We have not always followed *Walz's* reflective inquiry into entanglement, however. *E. g., Wolman*, 433 U. S., at 254. One of the difficulties with the entanglement prong is that, when divorced from the logic of *Walz*, it creates an "insoluable paradox" in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement. *Roemer* v. *Board of Public Works of Maryland*, 426 U. S. 736, 768–769 (1976) (WHITE, J., concurring in judgment). For example, in *Wolman, supra*, the Court in part struck the State's nondiscriminatory provision of buses for parochial school field trips, because the state supervision of sectarian officials in charge of field trips would be too onerous. This type of self-defeating result is certainly not required to ensure that States do not establish religions.

The entanglement test as applied in cases like *Wolman* also ignores the myriad state administrative regulations properly placed upon sectarian institutions such as curriculum, attendance, and certification requirements for sectarian schools, or fire and safety regulations for churches. Avoiding entanglement between church and State may be an important consideration in a case like *Walz*, but if the entanglement prong were applied to all state and church relations in the automatic manner in which it has been applied to school aid cases, the State could hardly require anything of church-related institutions as a condition for receipt of financial assistance.

These difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from an historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions, see *supra*, n. 6, depending upon how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results.

For example, a State may lend to parochial school children geography textbooks[7] that contain maps of the United States, but the State may not lend maps of the United States for use in geography class.[8] A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable.[9] A State may pay for bus transportation to religious schools[10] but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.[11] A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, *Meek* v. *Pittenger*, 421 U. S. 349, 367, 371 (1975), but the State may conduct speech and hearing diagnostic testing inside the sectarian school. *Wolman*, 433 U. S., at 241. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school,[12] such as in a trailer parked down the street. *Id.*, at 245. A State may give cash to a parochial school to pay for the administration of State-written tests and state-ordered reporting services,[13] but it may not provide funds for teacher-prepared tests on secular subjects.[14] Religious instruction may not be given in public school,[15] but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.[16]

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[7] *Board of Education* v. *Allen*, 392 U. S. 236 (1968).

[8] *Meek*, 421 U. S., at 362–366. A science book is permissible, a science kit is not. See *Wolman*, 433 U. S., at 249.

These results violate the historically sound principle "that the Establishment Clause does not forbid governments . . . to [provide] general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid' religious instruction or worship." *Committee for Public Education v. Nyquist*, 413 U. S. 756, 799 (1973) (BURGER, C. J., concurring in part and dissenting in part). It is not surprising in the light of this record that our most recent opinions have expressed doubt on the usefulness of the *Lemon* test.

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[9] See *Meek*, *supra*, at 354–355, nn. 3, 4, 362–366.

[10] *Everson* v. *Board of Education*, 330 U. S. 1 (1947).

[11] *Wolman*, *supra*, at 252–255.

[12] *Wolman*, *supra*, at 241–248; *Meek*, *supra*, at 352, n. 2, 367–373.

[13] *Regan*, 444 U. S., at 648, 657–659.

[14] *Levitt*, 413 U. S., at 479–482.

[15] *Illinois ex rel.* v. *McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

[16] *Zorach* v. *Clauson*, 343 U. S. 306 (1952).

Although the test initially provided helpful assistance, *e. g.*, *Tilton v. Richardson*, 403 U. S. 672 (1971), we soon began describing the test as only a "guideline," *Committee for Public Education v. Nyquist*, *supra*, and lately we have described it as "no more than [a] useful signpos[t]." *Mueller v. Allen*, 463 U. S. 388, 394 (1983), citing *Hunt v. McNair*, 413 U. S. 734, 741 (1973); *Larkin v. Grendel's Den, Inc.*, 459 U. S. 116 (1982). We have noted that the *Lemon* test is "not easily applied," *Meek*, *supra*, at 358, and as JUSTICE WHITE noted in *Committee for Public Education v. Regan*, 444 U. S. 646 (1980), under the *Lemon* test we have "sacrifice[d] clarity and predictability for flexibility." 444 U. S., at 662. In *Lynch* we reiterated that the *Lemon* test has never been binding on the Court, and we cited two cases where we had declined to apply it. 465 U. S., at ——, citing *Marsh v. Chambers*, 463 U. S. 783 (1983); *Larson v. Valente*, 456 U. S. 228 (1982).

If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it. The "crucible of litigation," *ante*, at 14, has produced only consistent unpredictability, and today's effort is just a continuation of "the sisyphean task of trying to patch together the 'blurred, indistinct and variable barrier' described in *Lemon v. Kurtzman*." *Regan*, *supra*, at 671 (STEVENS, J., dissenting). We have done much straining since 1947, but still we admit that we can only "dimly perceive" the *Everson* wall. *Tilton*, *supra*. Our perception has been clouded not by the Constitution but by the mists of an unnecessary metaphor.

The true meaning of the Establishment Clause can only be seen in its history. See *Walz*, 397 U. S., at 671–673; see also

Lynch, *supra*, at ——. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decisionmaking that has plagued our Establishment Clause cases since *Everson*.

The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

The Court strikes down the Alabama statute in No. 83-812, *Wallace* v. *Jaffree*, because the State wished to "endorse prayer as a favored practice." *Ante*, at 21. It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." History must judge whether it was the father of his country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.

The State surely has a secular interest in regulating the manner in which public schools are conducted. Nothing in the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized "endorsement" of prayer. I would therefore reverse the judgment of the Court of Appeals in *Wallace* v. *Jaffree*.

The CHAIRMAN. Mr. Levi, we will be glad to hear you.

STATEMENT OF JEFFREY LEVI

Mr. LEVI. Thank you, Mr. Chairman.

The National Gay & Lesbian Task Force joins its colleagues in the civil rights community in opposing the nomination of Justice William Rehnquist as Chief Justice.

Justice Rehnquist in his career on and off the bench has demonstrated a singular disregard for fundamental constitutional principles. He has approached major cases involving civil liberties and civil rights with one end in mind: The furtherance of his political and social agenda. In the process, he has disregarded—indeed, trampled upon—the constitutional rights of all Americans. This record of dangerous judicial activism should not be rewarded by elevation.

Gay and lesbian Americans have not been exempt from Justice Rehnquist's efforts to limit the rights of minorities. He has supported restrictions on the free speech and free association rights of gays and lesbians, and he has endorsed the denial of the right to privacy for homosexuals. These positions are threats to all Americans, not just homosexuals, because once we start making exceptions to fundamental constitutional rights for one group, it becomes increasingly easy to allow the Government to intrude on the freedoms of others.

In 1978, Justice Rehnquist dissented from a denial of cert in a case involving a gay student group at the University of Missouri. The University had refused recognition to the student group. The U.S. Court of Appeals for the Eighth Circuit, in a decision the Supreme Court chose to leave standing, said that the denial of recognition had violated the free speech and free association rights of the students. Justice Rehnquist did not see it that way at all. He said that simply because of their status—their being homosexuals—these students could be denied the right to free speech and free association. He likened the gathering of gay and lesbian students in a social and political organization to "those suffering from measles * * * in violation of quarantine regulations." He said that because Missouri had a sodomy law, the very act of assembly under these circumstances undercuts the significant interest of the State.

Our country has had a long tradition that conduct, not status, is punishable; it seems Justice Rehnquist would like to reverse that tradition. By the logic he expressed in this dissent, the State could restrict the association and speech rights of any group that might support directly or indirectly activity that is illegal.

Justice Rehnquist continued this attack on the fundamental rights of Americans, and in particular those Americans who happen to be gay or lesbian, in last month's decision in *Bowers* v. *Hardwick*. He joined in Justice White's majority opinion that is a rhetorical attack on homosexuals and homosexuality rather than a cogent legal analysis of the case presented to the Court. The Court ruled that homosexuals, simply because of their status, do not have a right to privacy in the conduct of their private, consensual sexual activities. Even though the law before the Court outlawed sodomy for homosexuals and heterosexuals, the Court focused only on homosexuals, using social and religious views rather than the law to justify their opinions.

This case raises fundamental issues for all Americans. If the Court can whittle away at the privacy rights of some, they can soon move on to reverse the trend to protection of privacy rights for all.

Mr. Chairman, my organization represents the 10 percent of the American population—and the 10 percent of your constituents—who are lesbian and gay. As citizens of this country, we ask for no special favors, merely the same fundamental constitutional rights that all Americans should have. Justice Rehnquist, on the basis of his record, would judge us and deny us our basic constitutional rights of free speech, free association, and privacy simply because of who we are. We are not the only minority group for whom such a record has been established by Justice Rehnquist, and there is no guarantee that this disregard for constitutional protections would not expand over time.

Justice Rehnquist has not been an impartial judge; he has demonstrated prejudice against significant portions of the American population in an ill-disguised attempt to impose his personal agenda—a most dangerous form of judicial activism.

The National Gay and Lesbian Task Force therefore urges this Committee to reject the nomination of William Rehnquist as Chief Justice of the United States.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

[Statement follows:]

NATIONAL
NGLTF
GAY & LESBIAN
TASK FORCE

Testimony on the Nomination of William Rehnquist as Chief Justice

Senate Judiciary Committee

Presented by
Jeffrey Levi, Executive Director
July 30, 1986

Mr. Chairman, the National Gay and Lesbian Task Force joins its colleagues in the civil rights community in opposing the nomination of Justice William Rehnquist as Chief Justice of the United States. Justice Rehnquist, in his career on and off the bench, has demonstrated a singular disregard for fundamental constitutional principles. He has approached major cases involving civil liberties and civil rights with one end in mind: the furtherance of his political and social agenda. In the process, he has disregarded--indeed trampled upon--the constitutional rights of all Americans. This record of dangerous judicial activism should not be rewarded by elevation to the highest judicial post of our nation.

Gay and lesbian Americans have not been exempt from Justice Rehnquist's efforts to limit the rights of minorities. He has supported restrictions on the free speech and free association rights of gays and lesbians and he has endorsed denial of the right to privacy for homosexuals. These positions are threats to all Americans, not just homosexuals, because once we start making exceptions to fundamental constitutional rights for one group, it becomes increasingly easy to allow the government to intrude on the freedoms of others.

I want to focus today on two cases in which Justice Rehnquist participated that demonstrate his support for restricting the rights of minorities; in these cases, gay and lesbian Americans.

In 1978, Justice Rehnquist dissented from a denial of cert. in a case involving a gay student group at the University of Missouri. (Ratchford, President, University of Missouri, et al. v. Gay Lib, et al.) The university had refused recognition to the student group. The U.S. Court of Appeals for the Eighth Circuit, in a decision the Supreme Court chose to leave standing, said that the denial of recognition had violated the free speech and free association rights of the students. Justice Rehnquist did not see it that way at all. Because the state of Missouri had made sodomy illegal, the state "may prevent or discourage individuals from engaging in speech or conduct which encourages others to violate those laws," Justice Rehnquist said. This was despite a formal statement from the students that they would not advocate illegal activity and the false assumption that the only reason for homosexuals to associate is to advocate sodomy.

In other words, Justice Rehnquist was saying that simply because of their status--their being homosexuals--these students could be denied the right to free speech and free association. He likened the gathering of gay and lesbian students in a social and political organization to "those suffering from measles...,in violation of quarantine regulations,...associat[ing] with others who do not presently have measles, in order to urge repeal of a state law providing that measle sufferers be quarantined. The very act of assembly under these circumstances undercuts a significant interest of the State...."

Our country has long had a tradition that conduct, not status, is punishable; it seems Justice Rehnquist would like to reverse that tradition. By the logic he expressed in this dissent, the state could restrict the association and speech rights of any group that might support directly or indirectly activity that is illegal. Would Justice Rehnquist therefore also outlaw all radical political parties or forbid any group from gathering that advocated civil disobedience?

Justice Rehnquist continued this attack on the fundamental rights of Americans, and in particular those Americans who happen to be gay or lesbian, in last month's decision in Bowers v. Hardwick. He joined in Justice White's majority opinion that is a rhetorical attack on homosexuals and homosexuality rather than a cogent legal analysis of the case presented to the Court. The Court ruled that homosexuals, simply because of their status as homosexuals, do not have a right to privacy in the conduct of their private, consensual sexual activities. Even though the law before the Court outlawed sodomy for homosexuals and heterosexuals, the Court focused only on homosexuals--using social and religious views rather than the law to justify their opinions.

As Justice Blackmun pointed out in his brilliant dissent, "this case is about 'the most comprehensive of rights and the right most valued by civilized men', namely, 'the right to be let alone'." He stated later that "it is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority....That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry."

This case raises fundamental issues for all Americans. If the Court can whittle away at the privacy rights of some, they can soon move on to reverse the trend to protection of privacy rights for all. A nominee for Chief Justice of the United States whose views are so antithetical to those embodied in the Constitution must be carefully scrutinized.

Mr. Chairman, my organization represents the interests of the ten percent of the American population--and the ten percent of your constituents--who are lesbian and gay. As citizens of this country we ask for no special favors, merely the same fundamental constitutional rights that all Americans should have. Justice Rehnquist, on the basis of his record, would judge us and deny us our basic constitutional rights of free speech, free association, and privacy simply because of who we are. We are not the only minority group for whom such a record has been established by Justice Rehnquist. And there is no guarantee that this disregard for constitutional protections would not expand over time. Justice Rehnquist has not been an impartial judge: he has demonstrated prejudice against significant portions of the American population in an ill-disguised attempt to impose his personal social agenda--a most dangerous form of judicial activism. The National Gay and Lesbian Task Force therefore urges this committee to reject the nomination of William Rehnquist as Chief Justice of the United States.

The CHAIRMAN. Ms. Shields.

STATEMENT OF KAREN SHIELDS

Ms. SHIELDS. Mr. Chairman, members of the Senate Judiciary Committee, my name is Karen Shields, and I am going to be summarizing my statement. I ask that the written statement be made a part of the record.

The CHAIRMAN. Without objection, the entire statement will go in the record.

Ms. SHIELDS. I am here representing the National Abortion Rights Action League, which is a political grassroots organization which represents and has a membership of almost 200,000 men and women in this country. I am NARAL's Board Chair.

As an Associate Justice, William Rehnquist has stated time and again his willingness to overturn *Roe* v. *Wade*. After 13 years of legal abortion, it is important for you to understand and try to imagine what women's lives will be like if William Rehnquist succeeds in overturning *Roe* v. *Wade*.

I want the magnitude of the decision you are making in deciding whether to confirm this man to be as clear to you as possible. It is only through personal experience that the real impact of illegal abortion in women's lives can be understood.

I have never before told publicly the story of my own illegal abortion. But mine is not an unusual story. It is a story shared by tens of thousands of women. Many of you have seen similar stories and letters from your constituents. And I would guarantee that every Senator who normally sits within this Chamber has received these letters.

In late 1970, I was 18 years old and I was just out of high school. I was a student in Tampa, Florida, and I was pregnant. Abortion was legal in New York, but I could not afford the trip.

After several unsuccessful tries at self-induced abortion, a friend of mine finally found a man with Mafia connections who could help me get an illegal abortion in Miami. It took every penny I had, plus the money many of my friends could scrape together, and by then I was four months pregnant.

This man took my friend and me to Miami. A woman there inserted a catheter and told me that I would abort in a few hours, but I did not. This man disappeared, and after 24 hours of waiting, I removed the catheter and my friend and I were left to hitchhike home. I was convinced at that point that I was pregnant and I was going to continue that pregnancy.

But a month later, 5 months into that pregnancy, I went into labor and I was rushed to the local hospital where I almost died as a result of that abortion.

In my vision of our country's future, no woman will be forced as I was to risk the dangers of self-induced abortion. No woman will be forced as I was into the hands of the Mafia because she is too poor or too young to afford a legal abortion or too young or too poor to travel to another State. No woman will have to choose as I did between an unwanted pregnancy and an illegal, unsafe abortion.

Some may question the propriety of examining a Justice's position on one particular issue. But 57 percent of the public believe that it is legitimate to reject a nominee who would overturn *Roe*. The American people understand that William Rehnquist's attitudes on abortion are important because abortion is an issue of far-reaching implication in women's lives. It is the right to choose abortion which guarantees the other rights that we have.

William Rehnquist's position on abortion illustrates his thinking on issues that affect every citizen of this country. If liberty does not include the right to make certain decisions in privacy, we will lose not only the right to abortion but also widely cherished rights to other decisions as well—decisions about marriage, family living, child rearing, what we read in our homes and our use of contraception.

The National Abortion Rights Action League urges you to vote against William Rehnquist's confirmation as Chief Justice of the Supreme Court in order to preserve the health, the privacy, the life, and the liberty of American women.

The CHAIRMAN. Thank you.

[Statement follows:]

Testimony
for
National Abortion Rights Action Leag

On Nomination of William Rehnquist
to Chief Justice of U.S. Supreme Court

Presented to
Senate Judiciary Committee
by
Karen Shields
Board Chair

Mr. Chairman, Members of the Senate Judiciary Committee, my name is Karen Shields and I am here representing the National Abortion Rights Action League, a grassroots political organization with a state and national membership of almost 200,000 women and men. I am NARAL's Board Chair. Speaking on behalf of our membership, I am here to persuade you that confirming William Rehnquist as Chief Justice of the US Supreme Court poses a direct and immediate threat to the health and well-being of millions of American women.

As an Associate Justice of the Supreme Court, William Rehnquist has stated time and again his willingess and desire to overturn Roe v. Wade. We believe that as Chief Justice he will take maximum advantage of the power of the position to influence the outcome of Court votes on key abortion cases.

If William Rehnquist prevails as Chief Justice, the Supreme Court could very well reverse the landmark case of Roe v. Wade and the protection of abortion rights will once again be left to the vagaries of the 50 state legislatures and local governments.

It is especially urgent that we face the immediacy of the threat to Roe under a Rehnquist Court. Every one of you is aware of the age of the sitting Justices and the reality that additional vacancies in the next few years are all too likely. It is reasonable to believe that a Rehnquist Court might overturn Roe. How likely is it? That is up to you. You in the United States Senate can determine the future of women's reproductive health in this country. You shape that future as you consider this nomination.

Society has been strengthened by the continuum of progress in women's rights. When the Supreme Court decided Roe it moved society forward by recognizing the link between reproductive choice and women's ability to enjoy the full range of personal liberties.

The Roe decision was a significant achievement in our struggle towards freedom from biological and societal restrictions; towards self-determination and autonomy in our life roles; towards control of our bodies and our destinies. This progress has continued since 1973. Women have reached our current status after an effort spanning decades, and our progress has changed social practice, law, in fact almost every aspect of women's lives.

William Rehnquist, however, is not forward looking. He is a 19th century man willing to push society backwards.

After 13 years of legalized abortion, it is important to try to imagine what women's lives would be like if William Rehnquist succeeded in overturning Roe v. Wade. With history to remind us, we know that:

*In some states abortion will be criminalized; and legal safe abortion will be absolutely denied to women.

*In other states abortion might be legal, but services will be difficult to obtain, expensive, and accessible to only a few wealthy women due to restrictive regulation. The Akron and Thornburgh cases give us a good idea of the kinds of restrictive legislation states may pass--restrictions unrelated to good medical practice but designed to intimidate women into continuing pregnancies.

*Those states where abortion continues to be both safe and legal, will shoulder the burden of an influx of women who have the money and resources to travel to another state for an abortion.[1]

Let me remind you more specifically of that past time of terror which William Rehnquist wishes to re-establish, by telling you of my own experience with an abortion in the winter of 1970-71 before the Roe decision, when abortion law varied from state to state.

I have never before told my story publicly. But mine is not an unusual story, as NARAL learned when it collected tens of thousands of letters from women in our Silent No More campaign. Each of you has received copies of letters from women in your state, telling similar stories.

In late 1970 I was 18 years old, just out of high school, a student in Tampa, Florida, and pregnant. Abortion was legal in New York, but I couldn't afford the trip north. After several unsuccessful tries at self-induced abortion, one of my friends finally found a man with Mafia connections who knew how I could get an illegal abortion in Miami. It took every penny I had plus the help of friends to scrape together the necessary funds. By then I was four months pregnant.

The Mafia contact took me and one of my friends to Miami. A woman there inserted a catheter and told me I would abort in a few hours. I didn't. The contact who drove us to Miami disappeared. After 24 hours of waiting, I removed the catheter myself and my friend and I were left to hitchhike over 200 miles home, convinced that nothing would work and I'd have to continue this pregnancy.

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[1] See attached document The Threat to Roe: A Legal Analysis by Harmon and Weiss

But a month later I developed alarming symptoms, and was rushed to the intensive care unit of the local hospital where I almost died as a result of that abortion.

In my vision of our country's future, no woman will be forced as I was to risk the dangers of self-induced abortion; no woman will be forced as I was into the hands of organized crime because she is too young, too poor to travel to another state; no woman will have to choose as I did between an unwanted pregnancy and an illegal, unsafe abortion.

It is your responsiblity to ensure that the Supreme Court is not led by a man willing to re-establish that reign of terror for every woman of childbearing age.

The question is not whether William Rehnquist can eliminate abortion. He can not. Women had abortions before Roe, and women will have abortions in the future. The question is whether those women can obtain safe, accessible, legal abortions or whether a Rehnquist Court will tell women they must risk their lives and health to obtain this medical service.

NARAL wants to ensure that all women have full access to the prerequisites for true reproductive choice, including: bodily integrity, contraception, abortion, delivery, and a world that supports and encourages parents in the raising of loved and well cared for children.

We need a Supreme Court and a Chief Justice who fully realize that their decisions make a vital day to day difference in the lives of women. We need a Supreme Court and a Chief Justice who recognize that women's lives are valuable, who respect women's right to make for ourselves the decisions that shape our lives, and who believe that women too require the free exercise of

fundamental rights, including the rights to liberty and privacy.

William Rehnquist does not fit that description.

Some of you may question the propriety of examining a Justice's position on one particular issue. We are concerned about William Rehnquist's attitudes on abortion because abortion is an issue of importance and far reaching implications in the lives of women.

Without the right to control our reproductive destiny, women are not able to exercise fully our right to be free from oppressive restrictions imposed by sex; our right to self-determination and autonomy. Without the right to choose when and whether to have a child--and abortion is the guarantor of that choice--women cannot exercise other fundamental rights and liberties guaranteed by the Constitution.

The right to choose to have an abortion is so personal and so essential to women's lives and well-being that its denial would deprive women of the ability to exercise fully our right to liberty--liberty as it was so eloquently explained by the Supreme Court in Meyer v. Nebraska:

> Without doubt (liberty) denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[2]

William Rehnquist's position on abortion is a good example of his beliefs and actions on other women's rights issues--safe and legal abortion will be only one casualty of the decisions of a man so insensitive to women's rights.

He refuses to apply to sex discrimination the same level of judicial review ordinarily applied to race discrimination. His record of extremism is reflected in at least 20 sex discrimination cases where he separated himself from the majority of the Court--cases that covered topics such as equal pay, medical benefits for dependents, promotion policies, the age of majority, benefits for widows and widowers.

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[2] Meyer v. Nebraska, 262 U.S. 390, 399 (1923)

Furthermore, William Rehnquist's position on abortion illustrates his thinking on issues that affect every citizen of this country. If liberty does not include the right to make certain decisions in privacy, we will not only lose the right to choose abortion but many other widely cherished decisions as well: decisions about marriage, family living, child rearing, what we read in our homes, our use of contraceptives.

We can not have a Chief Justice of the United States Supreme Court who does not believe in the constitutional protection of fundamental rights of the individual, but who believes instead in the right of the majority to impose its will in our private lives, and who is willing to interpret the Constitution for an age that ceased to exist over 100 years ago.

As author of a dissenting opinion in Roe, Justice Rehnquist focuses on a historical review of state laws in effect in the mid-1800's and refuses to validate any claims to rights except those rights recognized by the states at the time of the ratification of the 14th Amendment.

William Rehnquist has stated that since in 1973 most states had anti-abortion statutes on their books, the right to choose abortion could not be a part of the fundamental guarantees to liberty and privacy.[3] He believes that the courts must defer to the judgment of the legislatures rather than apply Constitutional principles to controversial issues.

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[3] In Roe v. Wade, 410 U.S. 113 (1973) Justice Rehnquist dissented: "The fact that a majority of the states reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellants would have us believe."

We must refuse to legitimize that kind of judicial philosophy, for it will affect almost every decision a Chief Justice makes, and almost every aspect of our lives.

There is no doubt that William Rehnquist refuses to recognize women's fundamental constitutional right in the area of abortion. He has signed opinions in at least 13 abortion cases in his years on the Court, and has clearly stated more than once his belief that Roe should be overturned.[4]

In his willingness to overturn Roe and return women to those dangerous times before our right to liberty and privacy in reproductive health matters had been recognized, he is willing to risk the life, health, and freedom of the women of this nation. This cavalier attitude towards women is not acceptable in the Chief Justice of the United States Supreme Court.

It is your Constitutional responsibility as Members of the Judiciary Committee and as Members of the United States Senate to consider the nominee before you and to consider the difference William Rehnquist as Chief Justice could make in the lives of the women of this country. It is your Constitutional responsibility to consider whether you trust William Rehnquist with the lives and health and liberty of American women.

Women make the choice of abortion because they take their responsibilities to existing family members seriously; because they believe that they can escape from poverty; because they believe that their education is important; because they believe that they have talents and skills to offer the world; because they believe that someday they will find the right partner to raise a family with; and because they have hopes and dreams of better lives for themselves and those they love.[5]

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[4] In Thornburgh v. American College of Obstetricians and Gynecologists, 54 LW 4618 (1986), Justice Rehnquist joined Justice White in saying ". . . If either or both of these facets of Roe v. Wade were rejected, a broad range of limitations on abortion (including outright prohibition) that are now unavailable to the States would again become constitutional possibilities.

In my view, such a state of affairs would be highly desirable from the standpoint of the Constitution." Thornburgh, at 4631.

The reasons why women choose abortion are numerous and profound. The Roe v. Wade decision recognized and preserved for women the right to make these crucial and highly personal decisions.

The National Abortion Rights Action League urges you to vote against William Rehnquist's confirmation as Chief Justice of the Supreme court, in order to preserve the health, privacy, life, and liberty of American women.

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[5] see brief amici curiae on behalf of the National Abortion Rights Action League, et al. in Thornburgh v. American College of Obstetricians and Gynecologists, supra.

NARAL REPORT
SUPREME COURT NOMINEES
Rehnquist and Scalia

THE THREAT TO ROE: A LEGAL ANALYSIS
Prepared for the National Abortion
Rights Action League
by Harmon and Weiss

INTRODUCTION

On Tuesday, June 17, 1986, President Reagan announced his nomination of conservative Justice William H. Rehnquist to the position of Chief Justice of the United States Supreme Court, replacing the retiring Warren E. Burger. To fill Rehnquist's seat on the Supreme Court, Reagan also nominated Antonin Scalia, another conservative, currently serving on the U.S. Court of Appeals for the District of Columbia. These nominations, if confirmed by the U.S. Senate, could have devastating consequences for the future of abortion rights.

While it does not appear on the surface that confirmation of these nominees will change the current pro-choice, anti-choice vote configuration on the Supreme Court, a closer look at the different personalities of the incoming justices reveals that the nominations may have a subtle, but nonetheless powerful, influence on future Supreme Court decision-making. Both nominees are considered to be personally and intellectually persuasive. Despite his record of frequent lone dissents, Rehnquist has been regarded warmly by all of the Justices from the most conservative to the most liberal. His cleverness and humor make him a strong political leader for the right wing of the Court. Scalia's personality, too, is generally liked by political foes as well as allies. Since he rigidly adheres to his ideological biases, it is ironic that he has developed a reputation as a consensus builder; his skills at building consensus enable him to exert a great deal of influence on people of opposing views. Both men have reputations for intellectual capacity as well. If these men are confirmed by the Senate, while the number of pro-choice vs. anti-choice votes may remain the same, the anti-choice minority will then be armed with stronger and more persuasive justices in its efforts to win a majority vote.

POTENTIAL FUTURE VACANCIES

The nominations of Rehnquist and Scalia may be only the beginning of Reagan's effort to pack the Supreme Court with anti-choice votes. Although the decision in Thornburgh v. American College of Obstetricians and Gynecologists was an encouraging reaffirmation of the principles of Roe that women decide their reproductive health and future lives, the pro-choice majority has narrowed to 5-4 (from a 6 to 3 decision in Akron in 1983), and a close look at the pro-choice voters on the court gives cause for substantial concern. The five justices who voted with the majority in Thornburgh are Blackmun, Brennan, Marshall, Powell and Stevens. Except for Stevens, who is 66, these justices are the oldest on the Court. At respective ages of 77, 80, 77 and 78, the possibility is high that we will soon lose to death or retirement a justice who will uphold and protect women's constitutional right to abortion.

Of the four justices who dissented in Thornburgh, White, Rehnquist, O'Connor and Burger, all but Burger are likely to be on the Court for quite some time. O'Connor, 56, and (if confirmed) Scalia, 50, are youthful Reagan appointees; Rehnquist at 61 would be a relatively young chief justice. All of Reagan's nominees to the Supreme Court are strongly anti-choice. And we have to expect that any other appointments Reagan might make to the Supreme Court will also be predisposed towards restricting or eliminating abortion rights.

The threat to Roe imposed by the pending nominations to the Court is very real. The advanced ages of the pro-choice justices increase the possibility of another Reagan appointee who is ideologically opposed to abortion. The personal charm and intellectual power of William Rehnquist will in all likelihood make him, if confirmed, an influential chief justice. Similarly, Scalia's personal popularity will enable him to become a persuasive majority leader on a slightly varied Reagan court. All of these facts will quickly make Roe more vulnerable than at any time since it was decided in 1973.

POWERS OF THE CHIEF JUSTICE

Although William Rehnquist is already an associate justice of the Supreme Court, his move to chief justice could dramatically increase his influence on the Court. Whenever the chief justice is in the majority, she or he may, and usually does, assign the writing of the majority opinion. This prerogative gives the chief justice great power. It enables him or her to woo allies on the Court by offering the prize of the opportunity to write historic opinions and also enables him or her to influence the outcome of specific Court rulings.

After argument, all cases are discussed in a conference attended by only the nine justices. Though votes are cast at that time, they are tentative, and frequently change depending on the reasoning used in the draft opinions. By assigning the majority opinion to a justice who is extreme in his or her views, the chief justice is likely to affect a change in the tentative votes, while by assigning it to a more moderate justice, the chief will probably keep the vote intact. Because the initial conference votes are not binding, the assigning and drafting of opinions is critical to the Court's final decision.

There are a number of ways a chief justice can maneuver to take maximum advantage of the power to assign opinions. She or he can vote with the majority to retain the privilege of making the assignment, but assign the case to such an extreme justice that the vote changes. She or he can also vote with the majority, assign the opinion, and then change her or his vote and write a dissenting opinion. She or he can self-assign the writing, and retain the writing of ground-breaking decisions for herself or himself.

The discussions in conference can be long and confusing, and it is the chief justice's responsibility to keep track of where each justice stands. This vote counting prerogative can be very significant. For example, at the end of the conference discussing Roe v. Wade, then Chief Justice Burger concluded that no decision could be determined, claiming in a memo, "At the close of discussion of this case there were, literally, not enough columns to mark up an accurate reflection of the voting." He "therefore marked down no vote and said this was a case that would have to stand or fall on the writing, when it was done." By exercising his prerogatives as chief justice, he both assigned the writing of the opinion and declared that the decision would be based on the words of his chosen justice.

WILLIAM REHNQUIST

Justice Rehnquist is solidly anti-choice and therefore likely to use the position of chief justice to chip away or attempt to eliminate constitutionally protected abortion rights. He wrote the dissent in the early abortion rights case Roe v. Wade and the reasoning used in that dissent now represents the new orthodoxy of conservative judicial thinkers. In Roe, Rehnquist focused on an historical review of state laws in effect in the mid-nineteenth century, and refused to recognize as fundamental liberties any rights but those given effect at the time the states adopted the Due Process clause of the Fourteenth Amendment, prohibiting states from taking away life or liberty without due process of law. (Other conservative legal thinkers use a similar method, cataloging eighteenth century state laws or procedures to impede the twentieth century development of concepts such as religious freedom and cruel and unusual punishment.) Like his ideological cohort Scalia, Rehnquist believes that the courts must defer to the judgment of the legislature when asked to apply constitutional principles to controversial issues (a majoritarian analysis) and concludes that since in 1973 most states had anti-abortion statutes on their books, the right to choose abortion could not be fundamental and is therefore entitled to a lesser degree of protection. The Bill of Rights would quickly disappear if the Supreme Court adopted this theory that the only rights deserving of constitutional protection are those already protected by majority approval.

Most recently in Thornburgh v. A.C.O.G., Rehnquist and White took the highly unusual step of suggesting that the court overrule Roe v. Wade, even though the parties to the case did not seek a re-examination of Roe. In calling for the reversal of Roe, Justice Rehnquist would have the Court abandon the concept that the court should follow its earlier precedents and destroy the complex body of abortion rights law developed by decisions over the last thirteen years. Rehnquist continues to be willing to sacrifice constitutional rights to the will of the majority stating that since "abortion is a hotly contested moral and political issue, [it should be] resolved by the will of the people." White and Rehnquist ignore the reality of women's lives, explicitly rejecting the notion that a woman's right to control her reproductive life is so fundamental that "neither liberty nor justice would exist if [it were] sacrificed."

Rehnquist is generally insensitive to women's rights, refusing to apply to sex discrimination the same level of judicial review ordinarily applied to race discrimination. When state laws or practices which contain racial or other classifications found to be "suspect" are reviewed by the Supreme Court to determine if they violate the Constitution, they are subject to a "heightened scrutiny" and survive only if they are narrowly drawn to accomplish a compelling state interest. In a move which indicates a willingness to tolerate and condone discrimination against women, Rehnquist has refused to apply this strict scrutiny to gender classification, believing instead that statutes containing sex-based classifications should be upheld if they have any rational basis whatsoever. Laws which incorporate and perpetuate discriminatory stereotypes of women can usually be found to have some rational basis, however dubious, and under Rehnquist's reasoning would therefore be upheld.

Finally and most dramatically, in a majority opinion which ignores the critical role that reproductive capacity plays in the lives of almost all women, Rehnquist wrote in General Electric

Co. v. Gilbert that an employer did not discriminate against women when it sponsored health insurance plans which covered almost every conceivable medical expense except those associated with pregnancy. The opinion virtually ignored a court record indicating that General Electric's practices had historically undercut the employment opportunities of its women employees who became pregnant and that the policy of excluding pregnancy benefits was motivated by an intentionally discriminatory attitude. Rehnquist's analysis, called "simplistic and misleading" by the dissent, stated in essence that classifications based on pregnancy do not constitute sex discrimination, since despite the fact that only women can become pregnant, not every female becomes pregnant.

ANTONIN SCALIA

In nominating Antonin Scalia, Reagan has selected a judge who shares his ideological opposition to abortion rights, and his view that the courts should play a very limited role in protecting constitutional rights in cases involving "morally controversial" issues. The intersection of these two views poses a serious threat to the individual liberty of women to make decisions about their lives, as well as to the continued ability of American political and racial minorities, as perennial targets of discrimination, to seek vindication of their constitutional rights in court.

Scalia's most dangerous view, which he shares with Justice Rehnquist, is his belief that the courts, in analyzing constitutional questions, must abstain from ruling on issues on which society has not reached a broad consensus. Not only is this a purely subjective determination, but there is no mechanism for accurately determining whether a societal consensus exists.

This jurisprudence is reflected in Dronenberg v. Zech, in which Scalia joined an opinion by Judge Bork which held that consensual homosexual conduct was not protected by the constitutional right to privacy. In discussing the right of privacy, the opinion stated:

> When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason.

Needless to say, such a philosophy would have prevented even the meager gains made by Black Americans during the 1960s, since at that time, the "majoritarian" judgment of a number of state legislatures was that Black Americans were not entitled to equal protection under the law.

While Scalia has never decided a case dealing specifically with abortion rights, we know from his public statements that he can be expected to vote against women's choice. At an American Enterprise Institute for Public Policy Research Forum, Scalia said, "We have no quarrel when the right in question is one that the whole society agrees upon," but of rights that might not be recognized or protected by the majority, specifically including abortion, Scalia added, "the courts have no business being there. That is one of the problems; they are calling rights things which we do not all agree on." (December 12, 1978). Because for many abortion is a morally complex issue, Scalia would defer to the various judgments of the Congress, the fifty state legislatures and the hundreds of local legislative bodies--where decision-making is often based on what is politically expedient today rather than on a reasoned application of constitutional principles and precedents. As a Supreme Court Justice, Scalia, in all likelihood, would rule that the liberty to make a personal private decision about abortion is not a fundamental right, because some people disagree with it.

There are other cases in which Scalia has shown himself hostile to the rights of women and minorities. For example, in Vinson v. Taylor, in which the Supreme Court upheld the D.C. Court of Appeals' decision that sexual harassment constitutes discrimination in violation of Title VII, Scalia joined Judge Bork at the appellate level in a dissenting opinion which uses language which insults and degrades women. The dissent characterizes a supervisor's sexual harassment of an employee as mere sexual "dalliance" and "solicitation" of sexual favors; the plaintiff's problems are ignored or trivialized while Scalia and Bork play intellectual games with the combinations and permutations resulting from mixing and matching hetero-, homo- and bisexual supervisors and employees. Scalia's concurrence in this decision indicates a great insensitivity to the real and serious problems of sex discrimination in our society.

Scalia's dissent in Carter v. Duncan-Huggins, Ltd., in which the D.C. Court of Appeals upheld a lower court finding that a black employee had been intentionally discriminated against by her employer, reflects a similar insensitivity to the problems of race discrimination. Scalia would have disregarded the clear evidence of intentional discrimination and formulated a principle that would have effectively prevented employees in small businesses from ever proving discrimination.

ANTI-CHOICE LITIGATION STRATEGY

The composition of the Supreme Court is critical to the future of abortion rights because anti-choice strategists see legislation coupled with litigation as the most fruitful avenue for overturning Roe v. Wade. Having failed in their efforts to overturn Roe v. Wade by amending the United States Constitution, the anti-choice groups have now adopted a legislation-litigation strategy. This focus on the courts was announced and developed at an important 1984 conference entitled "Reversing Roe v. Wade through the Courts," organized by the Americans United for Life Legal Defense Fund. Basically, the anti-choice lawyers are developing a gradual step-by-step litigation attack on the doctrines on which Roe is based. State laws which superficially appear to be reasonable regulation of abortion are introduced, and cases apparently limited to unusual facts are brought to the courts.

At this very moment, the pro-choice community is fighting, in both state legislatures and the courts, a host of these apparently reasonable statutes which purport to "regulate" abortion. In fact, the statutes restrict the right to abortion by making it impossible for clinics to locate in some communities, increasing astronomically the costs of providing abortion services and creating almost insurmountable hurdles for young women seeking abortion.

Only last month in Thornburgh v. A.C.O.G., the Supreme Court reviewed, yet again, another one of these state laws purporting to advance legitimate state interests in protecting the health of the pregnant woman or potential life. After looking at the provisions closely, Justice Blackmun characterized them merely as "attempts to intimidate women into continuing pregnancies." Needless to say, the regulations did not withstand constitutional scrutiny. However, a rigidly ideological court could rationalize these regulations and use them as vehicles to limit abortion rights.

ATTEMPT TO IMPOSE WAITING PERIODS

The Supreme Court will soon decide whether or not to hear Zbaraz v. Hartigan, a case challenging the Illinois Parental Notice Abortion Act of 1983. The case provides an excellent example of the issues which anti-choice lawyers have chosen to litigate; the Court will review the burdens imposed by a 24-hour waiting period for young pregnant women and a set of judicial procedures required for minors who need to avoid obligatory parental consent.

Courts have held that states may have an interest in promoting parental consultation by a minor seeking an abortion. On the other hand, in a series of cases culminating in Akron, the courts have said that since a mandatory waiting period before an abortion procedure poses a direct and substantial burden on women who seek to obtain an abortion, a waiting period can only be upheld if it is narrowly drawn to further compelling state interests. The Court will decide whether the state's asserted interest in promoting parental consultation justifies the burden imposed by the mandatory waiting period on the constitutional right to choose abortion. Scalia and Rehnquist are not likely to engage in a thoughtful analysis of whether a mandatory waiting period really accomplishes the state's asserted interest, and are also likely to ignore precedent recognizing the paramount interest of protecting a woman's right to abortion. This case provides an opportunity for the newly constituted Supreme Court to try to limit abortion rights by approving yet another restriction on the rights of young women. The Seventh Circuit struck down the mandatory waiting period and we believe that if the Supreme Court follows its precedents, it should also uphold the appellate court's decision.

The Zbaraz case also involves questions concerning anonymity and speed of judicial procedures which constitutionally must be available to minors seeking a judicial alternative to parental notification. Again, a long line of cases provides legal standards which must be met to assure that judicial alternatives to required parental consent for abortion meet constitutional guidelines; at a minimum, they must be fair, expeditious and protect a minor's confidentiality. If a Reagan Court hears Zbaraz, we fear it might give mere lip service to the asserted safeguards of speed and anonymity. By not even requiring clear rules, the Court could further erode abortion rights for young women.

CHALLENGE TO ABORTION AFTER THE FIRST TRIMESTER

Anti-choice strategists see viability (the statistical probability of sustained life outside the uterus) as a good way to attack Roe v. Wade. In Roe, the court divided a pregnancy into three trimesters and held that in the first trimester, a state could not prohibit abortion. Around the end of the first trimester, the state could regulate abortion, but only to protect the pregnant woman's health. In the third, which the Court believed was the point at which viability began, the state could choose to severely curtail abortion except to protect the life and health of pregnant women. In her dissent to Akron, Justice Sandra Day O'Connor speculated that in the ten years since Roe was decided, advances in medical technology were pushing back the date of viability, rendering the trimester analysis obsolete, and that Roe v. Wade was on a collision course with itself. Despite the extremely speculative nature of O'Connor's predictions about technological progress, anti-choice activists are now seeking to implement the strategy suggested by Justice O'Connor's opinion. They hope to make physicians unwilling to perform abortions by imposing burdensome and complex procedures for determining when a fetus might possibly be viable, and by imposing a risk of criminal sanctions on physicians whose estimates of viability are second-guessed.

The issue of criminal sanctions for abortions of possibly viable fetuses was before the Supreme Court in the 1985-1986 term in Diamond v. Charles, but the Court dismissed the case on technical procedural grounds. Insiders speculate that the case was dismissed by anti-choice justices disappointed that they were unable to put together a majority to uphold these regulations. Their chance may come again, however. Another challenge to a similar Illinois statute, Keith v. Daley, is now in the early stages in a Federal District Court in Illinois.

The Keith v. Daley Illinois abortion statute imposes criminal sanctions on a physician who aborts a viable or potentially viable fetus. The legislation would require a doctor to exercise the same care in performing these abortions as would be required in bringing a viable fetus to live birth. In Diamond v. Charles, the Seventh Circuit declared a similar provision unconstitutional but inadvertently provided guidelines which inspired the current anti-choice efforts to devise criminal sanctions to frighten physicians away from abortions and to thereby chill the pregnant woman's exercise of her constitutional rights.

Not content to rely on scientific definitions of viability, the Illinois legislature has also decreed that life begins at fertilization of the egg by the sperm. Under the statute currently being challenged in Keith v. Daley, doctors prescribing intra-uterine devices, certain birth control medications, and other birth control methods are required to recite a misleading litany or face prosecution.

CHALLENGE TO ABORTION IN THE FIRST TRIMESTER

One of the ways the anti-choice strategists seek to undermine the abortion right is to present it in a manner which appears narcissistic and trivial. The Illinois legislature has taken this tack with a statute which prohibits the performance of abortion at any time during a pregnancy when the pregnant woman is seeking the abortion solely on account of the sex of the fetus. This ploy was specifically suggested in the Americans United for Life conference; other similar suggestions included prohibitions if the abortion were based on emotional, eugenic or racial reasons. By using highly inflammatory examples, the anti-choice forces seek to mask the underlying principle that the individual woman and not the state can best make the decision. In this manner, they hope to drive a wedge between those who believe in the unqualified right of a woman to choose abortion and those who are most comfortable with abortion if it is justified by a compelling reason, particularly a medical one.

The Illinois law is being challenged in a case, Keith v. Daley, now in its early stages in the Illinois Federal District Court. If this case works its way up to the Supreme Court, it could provide the Court with an opportunity to re-examine Roe v. Wade, and probably restrict its application. A Reagan court could look at the Illinois statute and take the first step toward overruling Roe by substituting for the trimester framework an analysis based on socially approved reasons for abortion. When Justice Blackmun wrote Roe, he stated that the right to choose abortion was not unlimited or unqualified. Justice Blackmun chose to use trimesters of pregnancy to define when the right was absolute and when it was qualified; under that decision, during the first trimester the state cannot interfere with the abortion decision. The introductory section of Roe, however, devotes substantial time to rationalizations for the abortion decision (medical problems, psychological harm, health, stigma of unwed motherhood, etc.). A court dominated by anti-choice ideologues could use Keith v. Daley to undercut the constitutional right to abortion in the first trimester; it would only be absolute in the first trimester if all of society approved of the reason for seeking an abortion.

BURDENSOME CLINIC REGULATION

Another strategy of anti-abortionists is to seek the passage of state laws which burden abortion clinics with costly and unnecessary rules and procedures unrelated to health or good medical practice, in a badly disguised effort to limit access to abortion. Careful judicial review of these laws is particularly critical because upholding these burdensome regulations as "reasonable" provides a pretext for whittling away abortion rights. The 1983 Akron decision articulated the judicial standard of review of these regulations: they fail if they have a "significant impact" on a woman's ability to choose abortion. Nevertheless even a well-intentioned judge might have difficulty applying the standard to particular regulations. Faced with the spectre of a Reagan court, it's particularly alarming to realize that one must rely on the good faith of the justices to abstain from disingenuous decision-making.

Birth Control Centers, Inc. v. Reizen 743 F.2d 352 (6th Cir. 1984), demonstrates the pitfalls a judge can fall into while determining if these state rules impermissibly burden the abortion decision. In that case, the judges were asked to review various regulations related to staffing, physical structure of the clinic--even width of the corridors, equipment, and review of medical records by outside physicians--and determine whether these regulations, by increasing the cost of an abortion, would have a significant impact on a woman's right to terminate her pregnancy. An increase in the cost of an abortion which might seem incidental or trivial to a judge might nonetheless impose a significant financial barrier to a poor woman's access to abortion. When the Supreme Court Justices are asked to review similarly costly and burdensome regulations, women cannot and should not be at the mercy of the clever, glib, anti-choice Rehnquist and Scalia.

IMPACT ON WOMEN IF ROE V. WADE IS OVERTURNED

If President Reagan has his way, a Supreme Court consisting of anti-choice justices will reverse the landmark case of Roe v. Wade and the protection of abortion rights will be left to the vagaries of fifty state legislatures. The probable result is that abortion will be criminalized and absolutely prohibited in some states. In other states it might be available but expensive due to unnecessary regulation. In a few states, abortion might continue to be both safe and legal, and those states would then be overburdened by an influx of women from other states--at least those who can afford to travel. Such a crazy patchwork of conflicting laws will not eliminate abortion; it will just make access to safe and legal abortion more costly and burdensome, particularly for the indigent, the uneducated and the powerless women in our society, and force these women to resort to dangerous self-induced or illegal abortions.

After thirteen years of legalized abortion, it is hard to imagine what women's lives would be like if the choice of safe and legal abortion were eliminated. To try to get an accurate picture of how women would be affected by the loss of abortion rights, it is instructive to turn to the many letters NARAL collected as part of its Silent No More campaign.

Some letters tell the tale of women's experiences when abortion was illegal. Illegal abortions are not likely to be performed in safe and sanitary conditions nor are they likely to be performed by skilled practitioners. Many women who obtained illegal abortions did not survive.

> On November 18, 1971, my twin sister, Rose Elizabeth, died from an illegal abortion. This was after a very brutal rape . . . The traumas of being raped and pregnant, knowing she would die if she didn't have an abortion, the embarrassment, the pain, the guilt. She called a close friend who knew of a person who would do the abortion. She decided to wait until we all had left for church, then called her friend to pick her up (I can still remember opening the door of that old half abandoned building, and seeing her laid out on the table bleeding to death). She never made it out alive. . . For this reason I speak out today, for I believe if there had been a place where women, especially young women, could have gone for an abortion, where the environment was safe and clean, Rose Elizabeth, would still be with us today.

Those who lived often suffered serious medical complications:

> Becoming pregnant just two months after the birth of her first child, [my mother] was not well recovered from this experience. Her doctor was concerned for her health, but in 1940 there were no options. She and my father chose to abort this child, fearful her health was too fragile to manage another pregnancy so soon.

> Done by a backstreet butcher, the abortion put my mother's life in jeopardy and led to complications which nearly killed her during her pregnancy with me a few months later. She and I were in the hospital for 21 days following my birth and her health was permanently ruined. She underwent a hysterectomy by the age of 30 and has had two spinal fusions to attempt to repair the damage done to her body because of her pregnancies.

Many of those who obtained illegal abortions were forced to endure serious pain, terror and humiliation:

> I think the thing I will always remember most vividly was walking up three flights of darkened stairs and down that pitchy corridor and knocking at the door at the end of it, not knowing what lie behind it, not knowing whether I would ever walk back down those stairs again. More than the incredible filth of the place, and my fear on seeing it that I would surely become infected; more than the fact that the man was an alcoholic, that he was drinking throughout the procedure, a whiskey glass in one hand, a sharp instrument in the other; more than the indescribable pain, the most intense pain I have ever been subject to; more than the humiliation of being told, "You can take your pants down now, but you shoulda'--ha!ha!--kept 'em on before;" more than the degradation of being asked to perform a deviate sex act after he had aborted me (he offered me 20 of my 1000 bucks back for a "quick blow job"); more than the hemorrhaging and the peritonitis and the hospitalization that followed; more even that the gut-twisting fear of being "found out" and locked away for perhaps 20 years; more than all of these things, those pitchy stairs and that dank, dark hallway and the door at the end of it stay with me and chills my blood still.
>
> Because I saw in that darkness the clear and distinct possibility that at the age of 23 I might very well be taking the last walk of my life; that I might never again see my two children, or my husband, or anything else of this world.

Some women who did not or could not obtain abortions resorted to suicide:

> This is not a letter about an abortion. I wish it were. Instead, it is about an incident which took place over forty years ago in a small mid-western town on the bank of the original "Old Mill Stream". One night a young girl jumped off the railroad bridge to be drowned in that river. I will always remember the town coming alive with gossip over the fact that she was pregnant and unmarried. . . I could imagine the young girl's despair as she made her decision to end her life rather than face the stigma of giving illegitimate birth. . .I still grieve for the girl.

Without the right to control their reproductive destiny, women are not able to exercise fully their rights to liberty, "to enjoy those privileges long recognized. . . as essential to the orderly pursuit of happiness by free men." In amplifying the meaning of liberty, the Supreme Court, in the case of Meyer v. Nebraska, explained:

> Without doubt [liberty] denotes not merely freedom from bodily restraint but also the right of the individual. . . to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children.

Again, letters received from women who have had abortions demonstrate that abortion rights are necessary to enable women "to engage in the common occupations of life."

> My job on the assembly line at the plant was going well and I needed that job desperately to support the kids. Also I had started night school to improve my chances to get a better job. I just couldn't have another baby--5 kids were enough for me to support.
>
> I felt badly for a day or two after the abortion. I didn't like the idea of having to go thru with it. But it was the right thing for me to do. If I had had the baby I would have had to quit my job and go on welfare. Instead I was able to make ends meet and get the kids thru school.
>
> To this day I am profoundly grateful for having been able to have a safe abortion. To this day I am not a mother, which has been my choice. I have been safe and lucky in not becoming pregnant again. I love people and work in a helping profession which gives me much satisfaction.

The epidemic of teenage pregnancy is a constant topic for the press. We do not need the Silent No More letters to tell us about the tragedies of missed opportunities and wasted lives which follow unwanted teenage births. The drop-out teen mother is seldom able "to acquire useful knowledge." Abolishing abortion rights will only expand the problems of unwed, teenage births.

Abortion rights are also necessary to enable older students to pursue their studies. As one writer explains,

> I am a junior in college and am putting myself through because my father has been unemployed and my mother barely makes enough to support the rest of the family. I have promised to help put my brother through when I graduate next year and its his turn. I was using a diaphragm for birth control but I got pregnant anyhow. There is no way I could continue this pregnancy because of my responsibilities to my family. I never wanted to be pregnant and if abortion were not legal I would do one on myself.

Although conservative groups like the Moral Majority refuse to acknowledge it, the freedom to choose abortion may be necessary to enable some women to enjoy a loving marriage and responsible family life. Some women chose abortion to avoid an ill-fated forced marriage:

> I had an abortion in 1949 because I could not go through with a loveless marriage for the sake of a child I did not want. . . The benefits were incalculable. I was able to terminate the pregnancy, to complete my education, start a professional career, and three years later marry a man I did love. We subsequently had three beautiful children by choice, children who were welcomed with joy, cherished always, and raised with deep pleasure because we attained economic security and the maturity necessary to provide properly for them.

Other women need the option to choose abortion so that they can cope with the complex, competing demands of a responsible, caring family life.

> Ten years ago when abortions were illegal I was in a situation that would seem unbelievable on a soap opera. My husband was about to go to Vietnam as a physician. I had three children under the age of five, my mother was dying of a brain tumor diagnosed the week that my husband got his orders, my father had been earlier diagnosed as having leukemia, and my younger sister was within a year of getting married. I consider myself capable of handling most situations but on top of this I found myself pregnant. My first obligation was to my husband and my children but I felt a strong obligation to my parents as well. I simply did not feel I could or should cope with another baby. I was thirty years old.

The **Chairman**. Thank you.

The distinguished Senator from Delaware.

Senator **Biden**. Ms. Shields, that is the first time you have said that publicly?

Ms. **Shields**. Ever.

Senator **Biden**. I had a question for all three of you, beginning with Ms. Shields and then to Levi and then you, doctor.

These are certain things that cannot be wished away, and regardless of how firmly you all hold your views, and you have been three most outspoken so far—although we have not had many, but that is because many are going to testify tomorrow, spokespersons in opposition to Justice Rehnquist. And you all speak about what will happen if Justice Rehnquist is Chief Justice.

He is on the Court. He will remain on the Court as long as he wishes to remain on the Court, and his health permits, which I fully expect that will be for some good long time.

What is it about the Chief Justice position that makes you feel that the three issues which you have each spoken to, three separate issues, abortion, gay and lesbian rights, separation of church and state, will be so much more threatened by him as Chief Justice than as Associate Justice?

I am not being flippant when I ask that question. I mean you all talk about if this thing happens, a terrible calamity will befall each of the issues that you have spoken to. And I wonder how you think being Chief Justice will change from being Associate Justice the issues that you care about?

Starting with you, Ms. Shields, if I may.

Ms. **Shields**. We all know the reason that there is a Chief Justice is for the leadership. The reason that President Reagan did not nominate someone else from the Court was because Mr. Rehnquist holds his beliefs.

The leadership that a Chief Justice can provide can lead a Court toward the Chief Justice's position and philosophies. And we have seen that in the past. Additionally, remember that the Chief Justice decides who writes the majority opinion, if he is within that majority. We all know that in conference they vote unofficially and that people can change their votes in order to sway the majority.

When he assigns who writes the opinion, that can make a very big difference as to the final vote.

Senator **Biden**. I do want a response from each one, if I may.

I am in a quandary. I do not, as I guess people could tell, including the panel, I do not much share Justice Rehnquist's views on many of the issues that he has spoken to, either in his speeches and/or in his decisions.

Quite frankly, it seems to me that if he is as lone a dissenter as has been painted here—I guess what I am saying is I come tentatively to a different conclusion than you do, and that is that my concern is that one of the reasons why he might not make a good Chief Justice is that he is so far out of the mainstream of the Court. Therefore, will be in the minority so much that he will not be able to provide that necessary leadership in times of critical need, as did Warren and as others in the past.

But you seem—you do not seem, you come to a different conclusion. And I guess it goes back to Senator Simon's disagreement and mine about, not philosophy, but about he thinks being in the minority lends itself to demonstration of leadership. I think being in the minority so often raises questions about the effectiveness of being able to lead. You are worried to lead too much, and I am concerned that the Chief Justice will not lead enough.

And that is more a comment, that is not a question. And I should say before I move on to Mr. Levi, I have been impressed by one other thing about you. That is, you have sat here the whole time. I am not sure whether your physical constitution perceives your good judgment or not, but you deserve a red badge of courage because you are in about the fifth row back there for the whole day, and yesterday.

Ms. **Shields**. It was not just today.

Senator **Biden**. I know. And yesterday.

Mr. Levi, why do you think Justice Rehnquist in the role of Chief Justice would be so much more damaging, and what are your concerns about him, than as Associate Justice?

Mr. **Levi**. Senator, first I would like to comment that while each of us represents separate issues, I think we are all coming at this concern from the same place. When we are talking about privacy rights, we are talking about basic constitutional rights. And while each of our constituencies may embody a different aspect of that, we are all here talking about the Constitution, I think.

I think the reason certainly I am concerned about Justice Rehnquist being elevated to the office of Chief Justice is that the Chief in many respects is a symbol. He embodies the notion of justice in this country. And that is a notion that certainly in Justice Rehnquist's view does not include gay and lesbian Americans. And that is something that definitely concerns us. And by elevating him to the rank of Chief Justice would, to a certain extent, the U.S. Senate would be affirming those exclusionary views.

Senator **Biden**. Let me ask you another question then.

As the gentleman who testified before you, who said he could vote for Brennan, or he would testify on behalf of Brennan, Justice Brennan.

In the most, I think not only the most recent but probably the most far-reaching case regarding the specific issues which concerns you the most, Bowers versus Hardwick, Justice Rehnquist was in the majority.

Would you say that all those who ruled the same way he did would be similarly disqualified from serving as Chief?

Mr. **Levi**. Not necessarily.

Senator **Biden**. How can you arrive at that conclusion?

Mr. **Levi**. Because there is more of a pattern in Justice Rehnquist's past that does not lead one to believe that he would grow.

For example, the 1978 dissent on the denial of cert that I cited that involved the University of Missouri and a gay student group there, interestingly enough, Justice Blackman joined him in that dissent. That was in 1978. And now in 1986, Justice Blackman wrote a brilliant dissent in the *Hardwick* case. Which I think shows that Justice Blackman grew and was open to persuasion.

Justice Rehnquist is certainly remarkable in his consistency of viewpoint. And so there is nothing in his past or his present that would lead me to believe that there would be the sort of growth that would give me confidence that he might ultimately come around to protecting everyone's constitutional rights.

Senator BIDEN. Thank you.

Doctor.

Dr. MADDOX. I would gather up what my colleagues have said, and perhaps say it this way. Obviously the Chief Justice does have great powers of persuasion. He is a symbol, and he legitimizes what I see as a disturbing trend in the country and in my own particular issue—a disregard for religious freedom, the separation of church and state, of the rights of individuals, and a disregard of free exercise. And to elevate him to this high position—one of the very few men in the history of our country who has held that place—says this is the way we all believe these days.

I do not think that is the way that we all believe. But it surely does focus that. It is obvious Mr. Reagan agrees. Mr. Reagan has little regard for the separation of church and state. I am not sure he understands it. The surprising thing is that Mr. Rehnquist does understand it, and disregards it so consistently.

Senator BIDEN. I have no further questions.

I thank the three of you.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. I do not want to keep witnesses. We have got a lot here.

But you indicated to Senator Biden's question about the fact that he would still stay on the Court, what would his role as a Chief Justice be, what difference. And you came forth largely saying that the Chief Justice was a symbol of power, had powers of persuasion.

Do you feel that Chief Justice Burger in the past has represented the Court in that same manner and as a detriment to the overall justice of the United States?

Dr. MADDOX. I will wade off into that deep water, Senator, to say this respectfully.

I perceive in Mr. Rehnquist a man with a much sharper cutting edge than what I perceive of Mr. Burger. Mr. Rehnquist has demonstrated the capacity, even the desire perhaps, to be the rebel and to do it with effectiveness and sharp legal reasoning.

I think he will just have a lot more clout than Mr. Burger did. From what the press says, he is a better consensus builder than Mr. Burger was. And he is so consistent. Mr. Burger was at least not predictable. Mr. Rehnquist is completely predictable. It is always, or overwhelmingly, the state that wins against the individual.

Senator HEFLIN. The real strenuous proponents of Justice Rehnquist for this position to this committee, in effect, have charged that groups are out to get him, because they disagree with his opinions.

What is your answer to that charge?

Dr. MADDOX. Yes, sir. I do not equivocate. I do not know the man at all. He is probably a very fine man, a good daddy and a good provider. But I disagree vigorously with his views. That is what we have to go on. We are not judging his character as much as we are judging his views.

And I take serious exception, not only to his church/state view—and I think church/state is a very broad issue—but the whole sweep of his cavalier attitude toward individual rights.

Senator HEFLIN. Mr. Levi.

Mr. LEVI. I would certainly concur with that. And I think it is clearly, in my view, the role of the Senate not just to judge whether he is a man of good character, but also to judge his views and his ideology, and what ideology he will be bringing to the Court. What this man is going to participate in is going to affect the next generation of Americans, and I think that is critical.

Ms. SHIELDS. May I respond?

Senator HEFLIN. Please.

Ms. SHIELDS. I also would concur with my colleagues, but I would point out that when you come to abortion, you are looking at something that is much, much greater than one issue or one ideology. You are looking at the right that a woman has. And without abortion, women cannot and are not free to exercise every other right that they supposedly have under the Constitution. Because they must be able to control their own reproductive functions. I mean their body will reproduce, if they cannot control it, and it is only with abortion available that they can completely control reproduction. And if you look at how William Rehnquist has written his dissent in all of the abortion cases, and then if you listen to what he said in response to Senator Biden's questions today and over the last couple of days, basically Justice Rehnquist says that women only have very limited access to the protections of the 14th amendment.

He also says that he had reservations about ERA, which means where do we come under the Constitution? There are certain things about women that are not like men, and one of those is reproduction.

Senator HEFLIN. Well, does he, in effect, parrot the views of the President on those issues on abortion and the ERA?

Ms. SHIELDS. I believe that he holds those views, and I think that they go much deeper than representing the President. I think they are his views about women, and just as they are his views about minorities, et cetera.

But I also believe that the reason that he was nominated to be Chief Justice is because of his views on abortion.

Senator HEFLIN. Is the battleground for that the ballot box or the Senate Judiciary Committee?

Mr. LEVI. Well, Senator, the American people vote not just for President, they vote for the Senators. And the beauty of the system of checks and balances is creating that tension. And so if the President proposes one thing, the Senate can dispose in another manner. And that is what it is all about.

Senator HEFLIN. You have a point there, sir.

That is all I have.

The CHAIRMAN. Mr. Levi, are you an officer in the National Gay and Lesbian Task Force?

Mr. LEVI. That is correct. I am executive director.

The CHAIRMAN. Executive director?

Mr. LEVI. That is correct.

The CHAIRMAN. And how many members do you say you have?

Mr. **Levi**. We have about 10,000 members, and we also represent various organizations around the country.

The **Chairman**. Ten thousand members?

Mr. **Levi**. Right.

The **Chairman**. I was interested in one statistic you gave, that one-tenth of the population are gay or lesbian. I am shocked to hear that if that is true. Are you sure that figure is correct?

Mr. **Levi**. Well, those are not my figures. Those are figures that have been around for some 20 to 30 years. The Kensey Institute first put forward that 10 percent of American adults are predominantly homosexual in their behavior. A much larger figure would fall into the category of bisexual and those with relatively smaller numbers of homosexual experiences.

The **Chairman**. Does your organization advocate any kind of treatment for gays and lesbians to see if they can change them and make them normal like other people?

Mr. **Levi**. Well, Senator, we consider ourselves to be quite normal, thank you. We just happen to be different from other people. And the beauty of the American society is that ultimately we do accept all differences of behavior and viewpoint.

To answer the question more seriously, the predominant scientific viewpoint is that homosexuality is probably innate; if not innate, then formed very early in life. The responsible medical community no longer considers homosexuality to be an illness but rather something that is just a variation of standard behavior.

The **Chairman**. You do not think gays and lesbians are subject to change? You do not think they could change?

Mr. **Levi**. No more so, Senator, than heterosexuals.

The **Chairman**. You do not think they could be converted to be like other people in some way?

Mr. **Levi**. Well, we think we are like other people with one small exception. And, unfortunately, it is the rest of society that makes a big deal out of that exception.

The **Chairman**. A small exception. That is a pretty big exception.

Mr. **Levi**. Unfortunately, society makes it a big exception. We wish it would not, and that is why our organization exists.

The **Chairman**. Well, we thank you all for coming and testifying. And you are now excused.

Ms. **Shields**. Mr. Chairman, could I just say that I was honored to be the first woman to speak in these 3 days of hearings.

The **Chairman**. Thank you very much.

Our next panel, Mr. Frank Askin, professor of law, Rutgers University; Mr. Gary Orfield, professor of political science, University of Chicago; Mr. Craig Bradley, Indiana University—we have had Mr. Craig Bradley already I believe—Mr. Norman Rosenberg; and Ms. Melanne Verveer.

If you all four can be sworn.

Will the testimony given in this hearing be the truth, the whole truth, and nothing but the truth so help you God?

Mr. **Askin**. Yes.

Mr. **Orfield**. Yes.

Ms. **Verveer**. Yes.

The **Chairman**. Is Mr. Rosenberg here? Mr. Craig Bradley has already testified I believe. Mr. Orfield and Mr. Askin.

Mr. Askin, you may proceed.

TESTIMONY OF A PANEL CONSISTING OF FRANK ASKIN, PROFESSOR OF LAW, RUTGERS UNIVERSITY, NEWARK, NJ.; GARY ORFIELD, PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF CHICAGO, CHICAGO, IL; AND MELANNE VERVEER, PUBLIC POLICY DIRECTOR, PEOPLE FOR THE AMERICAN WAY, WASHINGTON, DC

Mr. ASKIN. Thank you, Mr. Chairman.

I am Frank Askin. I am a member of the faculty of Rutgers Law School in Newark, NJ, where I have taught constitutional litigation and Federal procedure for the past 29 years.

In 1970, I established the Constitutional Litigation Clinic as part of the academic program at the law school. One of the earliest matters my students and I handled in our clinic was the case of *Tatum* v. *Laird*, about which there has been much comment in the past 2 days.

It is my experience as the chief counsel in the *Tatum* case, which forms the basis of my testimony, because I believe, based on that experience, that serious doubt exists as to whether Justice Rehnquist possesses the judicial temperament appropriate to the Chief Justice of the United States.

My own personal experience suggests that Justice Rehnquist is a most partisan and result oriented jurist. Characteristics which may indeed disable him from being an even-handed, an impartial administrator of what has heretofore been considered the most respected judicial institution on the face of the earth.

I have already submitted a lengthy written statement, and in the time allotted for my oral presentation, it is impossible for me to do more than summarize its conclusions without repeating its evidentiary basis. So let me state in capsule summary that *Tatum* was a case in which I believe Justice Rehnquist breached the most elementary and universal principle of judicial ethics; that no one can be both advocate and judge in the same case.

The fact is that after serving as a most partisan advocate of the government's position on both the law and facts of the case, in testimony before a Senate investigating committee, Justice Rehnquist joined the Supreme Court in time to cast the deciding vote in favor of his own side in the dispute.

It was as if Billy Martin resigned as manager prior to the seventh game of the World Series, and accepted appointment as the umpire.

It was not merely that Justice Rehnquist in a colloquy with Senator Ervin before the Senate's Constitutional Rights Subcommittee expressed his personal opinion on the case, and the very legal issue that he ultimately decided as a member of the Court. That was the least of his ethical sins.

What he did was to transport his own view of a vigorously contested factual dispute into the hallowed marbled halls of justice.

I assure you that the plaintiffs in the *Tatum* case did not have any of their members or advocates sitting in the court's conference and casting a vote on the outcome. I think this is a most important factor for the committee to understand, for in his very facile opinion, refusing to recuse himself in *Tatum*, Justice Rehnquist would have us believe that all he did was join an opinion which affirmed a legal view which he had previously endorsed. Not true.

He signed onto an opinion which endorsed disputed facts of which Assistant Attorney General Rehnquist had been a major proponent. The evidence of the serious allegations is set forth in my written testimony, which I hope the Committee will carefully read and consider.

I recognize that my testimony can be dismissed as the sour grapes of a defeated advocate. That is why I included in my written submission the recorded views of the late Senator Sam Ervin, who wound up being my co-counsel in the Supreme Court after filing an amicus brief. But, in addition to his recorded expressions, I will never forget the incredible disappointment that Senator Ervin expressed at Justice Rehnquist's behavior in *Tatum*.

I must tell you on the Friday before the Monday of the oral argument in *Tatum*, I met with Senator Ervin in his office to discuss that argument. As I was leaving, I resurrected an earlier conversation, and said, "Senator, you know, we still have time to file a motion for recusal of Justice Rehnquist. Do you think we should do it?" He replied to me, "Frank, do not worry. I know Justice Rehnquist. He is very conservative but he is a very honorable man. He will not sit on this case."

Monday morning, the case was called. Senator Ervin and I moved up to the front bench. And again I whispered to him, I said, "Senator, Justice Rehnquist has not left the bench." He was still nonplussed. He said "do not worry, he is not going to participate, he just wants to listen."

It was a year later after Justice Rehnquist cast that deciding vote in *Tatum* that I ran into Senator Ervin in Washington at a conference. And he saw me, and he came striding across the room and he said, Frank, I sure was wrong about Justice Rehnquist, wasn't I?"

[Statement follows:]

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TESTIMONY OF

FRANK ASKIN

Professor of Law, Rutgers Law School, Newark, New Jersey

Prepared for

United States Senate Judiciary Committee Hearing
July 29, 1986
on Confirmation of Justice William Rehnquist
as Chief Justice of the United States

Counsel: Frank Askin-Jonathan M. Hyman (Administrative Director) · Eric Neisser-Barbara Stark

My name is Frank Askin. I have been a member of the faculty of Rutgers Law School, Newark, New Jersey, for the past 20 years. I served as Special Counsel to the House Committee on Education and Labor during part of the 95th Congress, and served as special counsel to Senator Moynihan during the summer of 1978.*

However, my credential most relevant to the testimony I will give today is that I was chief counsel for the plaintiffs, both in the lower courts and in the Supreme Court, in the case of Laird v. Tatum,408 U.S.1 and 409 U. S.824 (1972). It is my view that the role played by Mr. Justice Rehnquist in the disposition of that case raises the most serious questions as to whether he possesses the judicial temperament appropriate to a Chief Justice of the United States. The fact is that he sat on and cast the deciding vote in a case in which he had been involved in a partisan capacity before being appointed to the bench.

Since I recognize that my views will be immediately suspect as those of a defeated and disgruntled advocate, I must at the outset enlist the support of the late Senator Sam Ervin, whose reputation as a constitutional and legal scholar, as well as his personal integrity, is surely beyond reproach.

Senator Ervin, because of his intimate involvement in both the factual background of the Tatum litigation and the Supreme Court argument itself, was the only other person in a position to be fully aware of Justice Rehnquist's unique role in that matter and the ethical propriety of his insistence on casting the decisive vote when it came before the Court.

Senator Ervin had filed an amicus brief with the Court in Tatum and, as a result, shared part of my oral argument. In essence, he became my co-counsel in the Supreme Court.

In a letter dated 3 years after the Tatum decision, Senator Ervin commented that "Justice Rehnquist ought to have disqualified himself from participating in the case because he had acted as counsel for the Defense Department in the hearing before the Senate Subcommittee on Constitutional Rights." (I attach a full copy of Senator Ervin's letter hereto as Attachment A.)

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* By way of disclaimer, I must also note that while I am also one of the three General Counsel of the American Civil Liberties Union, I speak here today only for myself and do not represent the ACLU, which by its own by-laws is forbidden to support or oppose nominees for elective or appointive public office.

Nor was this the only time Senator Ervin made known his views on Justice Rehnquist's participation in the Tatum decision.On July 14, 1973, Senator Ervin had inserted in the Congressional Record an article concerning the case which had appeared in the Hofstra Law Review, and which Senator Ervin described as "excellent." (Cong. Rec., 7/14/73, S 13481.) In that article, the author commented upon "the serious ethical dilemma Mr. Justice Rehnquist's participation in Laird v. Tatum has posed for himself, the Court and the Constitution." (Id. at S 13485)

Let me state at the outset that with the added wisdom drawn from an additional 14 years of teaching federal procedure and practicing in the federal courts, I am convinced now more than ever that Mr.Justice Rehnquist acted in an ethically improper way in regard to the Tatum case. I believe his actions in regard thereto marked him as an intensely partisan, result-oriented jurist who was willing to evade and avoid the most basic principles of judicial ethics to make sure the case turned out in one particular way -- and more importantly, in favor of his own former "clients."

I recognize these are serious allegations; and in order to substantiate them I must now explain in some detail the factual and procedural history of the case of Tatum v. Laird.

I filed the Tatum complaint in the Federal District Court in the District of Columbia in the early spring of 1970 on behalf of a number of individuals and organizations involved in the civil rights and anti-war movements. The complaint alleged that the United States Army and Department of Defense had established a wide-ranging program of surveillance and infiltration of law-abiding, domestic organizations, maintained the information gathered in computerized data banks and had widely disseminated its intelligence reports to federal, state and local civilian agencies as well as military offices.

It was the theory of the complaint that the Army's Domestic Intelligence Program violated the First Amendment of the United States Constitution, and that the plaintiffs, all of whom had been targets of the military's surveillance program, were the proper parties to seek to enjoin it.

At our initial hearing in the District Court, before the filing of an answer or an opportunity to institute discovery proceedings, the District Judge dismissed the Complaint for failure to state a claim upon which relief could be granted, taking the position that there was nothing in the First Amendment which precluded the Army from carrying out the program described by the plaintiffs.

In April 1971, the Court of Appeals reversed the District Judge and ordered the case remanded for a trial of plaintiffs' allegations. The defendants petitioned for certiorari.

Meanwhile, Senator Ervin's Constitutional Rights Subcommittee opened its own hearings into the Army's Domestic Intelligence Program.

On March 9 and again on March 17, 1971, Mr. Rehnquist, who was then Assistant Attorney General, testified before the Committee on behalf of the Department of Justice. During that testimony, the witness engaged in a wide-ranging discussion both of his views on the power of the Executive Branch to surveil and keep data files on political activists as well as the law and facts, as he viewed them, involved in the case of Tatum v. Laird, then pending before the U.S. Court of Appeals for the District of Columbia.

In one exchange,the witness (now Justice Rehnquist) told Senator Ervin:

> My ... point of disagreement with you is to say whether as in the case of Tatum v. Laird that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government. (Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the United States Senate, 92nd Cong, 1st Sess., on "Federal Data Banks, Computers and the Bill of Rights," Part I, at 864-5. Hereinafter cited as "Hearings.")

In his wide-ranging colloquy with Senator Ervin, Attorney General Rehnquist made clear his disagreement with the substantive constitutional claims of the Tatum plaintiffs and challenged the basic factual predicate of the Tatum complaint: that Army surveillance cast a pall over civilian political activity and chilled its exercise, as the following excerpts demonstrate:

> SENATOR ERVIN: Don't you think a serious constitutional question arises where any government agency undertakes to place people under surveillance for exercising their first amendment rights?
>
> MR. REHNQUIST: .... When you ... say: Isn't a serious constitutional question involved, I am inclined to think not, as I said last week. This practice is undesirable and should be condemned vigorously, but I do not believe it violated the particular constitutional rights of the individuals who are surveyed.
>
> SENATOR ERVIN: ... [D]o you not concede that government could very effectively stifle the exercise of first amendment freedoms by placing people who exercise those freedoms under surveillance?
>
> MR., REHNQUIST: No, I don't think so, Senator. It may have a collateral effect such as that but certainly during the time when the Army was doing things of this nature, and apparently it was fairly generally known it was doing things of this nature, those activities didn't deter 200,000 or 250,000 people from coming to Washington on at least one or two occasions to express their first amendment rights by protesting the war policies of the President.
>
> * * *
>
> SENATOR ERVIN: Well there is also evidence here of photographers having been present at many rallies. Army intelligence agents pretending to be photographers were present at many rallies, took pictures of people, and then made inquiries to identify these people and made dossiers of them. Do you think that is an interference with constitutional rights?
>
> MR. REHNQUIST: I do not, Senator.....I don't think the gathering by itself, so long as it is a public activity, is of constitutional stature. (Hearings, at 861-62.)

It was those exchanges with Senator Ervin -- especially the first, in which the future Justice expressed his view on the precise legal issue upon which he was later to cast the decisive vote in the Supreme Court -- which has most often been cited as the reason why Justice Rehnquist ought to have recused himself from the Tatum argument and decision. See generally, Note, "Justice Rehnquist's Decision to Participate in Laird v. Tatum," 73 Col. L. Rev. 106 (1973); Note, "Laird v. Tatum: The Supreme Court and the First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity," 1 Hofstra L. Rev. 244 (1973).

In fact, it was neither the only nor the most persuasive of the reasons calling for recusal. In my view, the really egregious ethical breach committed by Justice Rehnquist had to do with the fact that he was an advocate, and indeed a "witness" to crucial and disputed factual issues which were resolved and relied upon in the majority opinion of Chief Justice Burger. To my mind, it was shocking that Justice Rehnquist should have joined in an opinion relying upon alleged facts upon which he had already expressed his own biased and partisan view as an advocate before a Senate investigating committee.

Justice Rehnquist's view of the "facts" of the Tatum litigation were clearly expressed by him in his earlier testimony. In his testimony on March 9, 1971, witness Rehnquist categorically told the Senate that the Army had disbanded its domestic intelligence program and that those functions had been turned over to the Justice Department. His testimony was as follows:

> The function of gathering intelligence relating to civil disturbance, which was previously performed by the Army as well as the Department of Justice, has since been transferred to the Internal Security Division of the Justice Department. No information contained in the data base of the Department of the Army's now defunct computer system has been transferred to the Internal Security Division's data base. However, in connection with the case of Tatum v. Laird now pending in the U.S. Court of Appeals for the District of Columbia Circuit, one printout from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed. (Hearings, at 601)

There are actually four significant factual assertions contained in that statement of witness Rehnquist:

1) The Army had ceased its domestic intelligence program;
2) The Army's computer system was defunct;
3) No information gathered through the Army's intelligence program had been transferred to the Justice Department;
4) There was only one remaining printout from the Army's computer which was destined for destruction at the conclusion of the Tatum litigation.

I do not question that Mr. Rehnquist believed everything he testified to before the committee. But they were not undisputed and established "facts."* They were factual claims made by the government in response to the Tatum complaint, which were disputed by the plaintiffs, and which plaintiffs never had an opportunity to rebut at an evidentiary hearing -- because District Judge Hart had considered the facts irrelevant and dismissed the complaint on a Rule 12(b)(6) motion to dismiss for failure to state a claim.

However, after the Court of Appeals reversed Judge Hart's ruling and remanded the case for a full evidentiary hearing, the defendants attempted to present these alleged "facts" to the Supreme Court in an effort to make it appear that there was no basis at all to plaintiffs' complaint and that if there ever had been a real controversy at stake it was by then moot, since the Army had dismantled its domestic surveillance program.

Precisely because of this effort by the defendants to create a fictitious factual record in the Supreme Court, the Statement of the Case in the Brief for Respondents opened as follows:

> The only issue before this Court is whether the complaint states a justiciable claim entitling plaintiff's to a hearing. Because much of the government's Statement of the Case is based upon representations and documents which are not properly part of the record, and because the government ignores many of the material allegations made by plaintiffs, we set out in some detail the allegations of the complaint and the facts which underlie them. (Respondents' Brief in the Supreme Court of the United States, October Term, 1971, No. 71-288, at 2.)

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* Indeed, it was subsequently demonstrated that at least some of these claims were patently false, although there is no reason to believe that Attorney General Rehnquist knew it at the time. Presumably, he was merely repeating "facts" which had been supplied to him by the Department of Defense.

Most of Respondents' 19-page Statement of the Case went on to challenge the claims of the defendant (the same claims made by Attorney General Rehnquist before the Ervin Committee) that the Army had ceased its surveillance program and had dismantled its computerized intelligence system, and set forth the record allegations disputing those alleged "facts." Respondents' Statement further pointed out that there was a factual allegation, unchallenged on the record before the Court, that the intelligence information collected under the surveillance program had been disseminated widely to military and civilian agencies of government, a claim apparently disputed by Mr. Rehnquist's testimony that no information had been transferred to the Justice Department's data base. (Because of the centrality of these facts to my main thesis, I am appending the entire Statement of the Case from the Brief of Respondents as Attachment B.)

(I must at this point apologize for the length and detail of this statement. However, I believe the detail is essential to a proper understanding of the role of Mr. Justice Rehnquist in the litigation of this case.)

As a matter of legal analysis, it might be possible to conclude that these "factual" claims asserted by the government in its brief and by Attorney General Rehnquist before the Ervin Committee were irrelevant and unessential to the decision in Tatum, which held that the plaintiffs' complaint was not justiciable. The problem with that analysis lies not only in the fact that the government's lawyers thought it important, but also in the fact that the majority opinion, which Mr. Justice Rehnquist joined, makes much of them.

In establishing the "factual" predicate for the decision, the majority opinion stated:

> By early 1970, Congress became concerned with the scope of the Army's domestic surveillance system; hearings on the matter were held before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. Meanwhile, the Army, in the course of a review of the system, ordered a significant reduction in its scope.

> For example, information referred to in the complaint as the "blacklist" and the records in the computer data bank at Fort Holabird were found unnecessary and were destroyed. One copy of all the material relevant to the instant suit was retained, however, because of the pendency of this litigation. (408 U.S. at 7.)

That language has a remarkable resemblance to the testimony of Attorney General Rehnquist before the Ervin Committee. And -- I cannot over-emphasize -- these "facts" were sharply disputed by the plaintiffs, who did not happen to have any of their "witnesses" sitting on the Court which voted 5 to 4 to uphold the government's position.

In response to the plaintiffs' post-decision motion for rehearing and recusal, Justice Rehnquist minimized his personal connection to the facts of the Tatum case and defended his prior comments on the legal questions with a lengthy discussion which is best summarized by his unexceptional observation that no Justice arrives on the Court with a mind which is "a complete tabula rasa in the area of constitutional adjudication."

The Justice's opinion insisted that his only comment on the "facts" of Tatum at the Ervin Committee hearings was contained in the statement "one print-out from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed." This comment totally ignored his personal testimony on the dis-establishment of the Army's intelligence program, an issue much disputed by the plaintiffs but asserted in the majority opinion as if it were established fact. (Mr. Justice Rehnquist's opinion denying plaintiffs' motion for recusal is printed at 409 U.S.824 (1972).)

The fact is that any careful reading of Attorney General Rehnquist's testimony before the Ervin Committee leads to the inescapable conclusion that, as a government attorney, he had been an advocate for a very partisan view of both the facts and the law in Tatum v. Laird and, therefore, could not ethically participate as an impartial judicial officer in its ultimate decision.

As the New York Times commented editorially at the time: "The question is not the Justice's prior views or opinions on matters before the Court; it is rather his prior active involvement in a case itself ..." (New York Times, editorial page, October 12, 1972.)

A similar conclusion was reached by several academic commentators, even without the benefit of a detailed and intimate familiarity with the factual context of the case. A note in the Columbia Law Review concluded as follows:

> Justice Rehnquist did not violate the specific provisions of Section 455 , the only statutory standard to which he was bound. His participation was not, however, consistent with the goal of an impartial judiciary, as embodied in the Code of Judicial Conduct, section 144, section 7 of the Administrative Procedure Act, and Supreme Court pronouncements. Having made widely publicized statements on the factual and legal issues involved in Laird v. Tatum, Justice Rehnquist failed to take adequate cognizance of the need to maintain the "appearance of justice" when he chose to participate in the Laird decision. Although his judgment might have been impartial, his participation in Laird lacked the appearance of impartiality necessary to maintain public confidence in the Supreme Court. (Note, "Justice Rehnquist's Decision to Participate in Laird v. Tatum,"73 Col. L. Rev. 106, 124 (1973).)

The Hofstra Law Review article cited earlier concluded that Mr. Justice Rehnquist's participation posed "a serious ethical dilemma" "for himself, the Court and the Constitution." ("Laird v. Tatum: The Supreme Court and a First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity," 1 Hofstra Law Review 244, 271 (1973).)

Mr. Justice Rehnquist's opinion acknowledged that the question of his recusal was "a fairly debatable one" and that "fair-minded judges might disagree" with his decision. 409 U.S. at 836. He then went on to state that the prospect that his recusal would result in affirmance of the Court of Appeals' decision by an equally-divided court propelled him to decide the case.

This notion that the normal rules of judicial impartiality do not count when the judge's vote may be crucial, seems to turn the doctrine of recusal on its head. As the New York Times observed in the editorial cited earlier: "[T]o argue thus seems only to underscore the impropriety of a former Government representative continuing a Government case on the Supreme Court -- the court of last resort." (NYTimes, Oct. 12, 1972.) Another critical commentary on this aspect of Justice Rehnquist's opinion appears in a recent book on the Supreme Court by Prof. Stephen L. Wasby of the State University of New York at Buffalo. Introducing a discussion of his Tatum opinion, the author says:

> A Justice's participation in a case solely to create a full court is not necessarily proper, as a particular problem involving Justice Rehnquist illustrates.
> (Wasby, The Supreme Court in the Federal Judicial System, Holt, Rinehart & Winston, 1984, 2d Ed.)

Indeed, even Justice Rehnquist's notion that a split court would have left the principle of law involved "unsettled," 409 U.S.at 837-8, was a bit sophistic. Affirmance of the Court of Appeals' decision in Tatum would really have "settled" nothing. It would merely have permitted a trial of plaintiffs' claims to proceed. Indeed, generally accepted rules of judicial restraint would have counseled against premature Supreme Court determination of such issues without a full factual record -- especially in light of the sharp factual conflict over the continuation of the Army's surveillance program.

With all due respect, there seems to be no other explanation for Justice Rehnquist's participation in Tatum than his desire to shield his former government colleagues from having to defend their (and his) factual claims and contentions in an adversary proceeding.

* * *

It is my concern that the behavior described here reflects a judicial temperament which is so partisan and result-oriented that it raises questions about Mr.Justice Rehnquist's qualifications to be the nation's Chief Magistrate, an office in which the nation reposes its greatest trust for the fair and impartial administration of the Laws of the Land.

While I do not claim to be a careful student of Mr. Justice Rehnquist's judicial output, I am aware that at least one eminent scholar has discerned a similar result-orientedness in the Justice's work product. In an exhaustive survey of Justice Rehnquist's early opinions, Prof. Daniel Shapiro of Harvard Law School produced a lengthy and detailed analysis of what he considered Justice Rehnquist's partisanship, commenting that: "[I]n too many instances Justice Rehnquist's efforts have been impeded by his ideological commitment to a particular result." (Shapiro, "Mr. Justice Rehnquist: A Preliminary Review," 90 Harv. L. Rev. 293, 328 (1976).) See also Riggs and Proffitt, "The Judicial Philosophy of Justice Rehnquist," 16 Akron L. Rev. 555 (1983).

This Committee and the United States Senate has an awesome responsibility when called upon to offer its advice and consent to the appointment of a Chief Justice. The United States Supreme Court is a majestic institution, the most inspiring and respected judicial body in the history of the earth. It has been the bedrock of our constitutional democracy for 200 years. It is the world's leading symbol of equal justice under law. It requires a Chief Justice worthy of the office. I offer these comments in the hope that they may be of some small value in helping in the performance of that function.

United States Senate
WASHINGTON, D.C. 20510

Morganton, North Carolina 28655
June 26, 1975

LOUIS MENAND, III
ROOM 3-234
JUL 1 1975
file:
refer to:

Professor Louis Menand, III
Department of Political Science
Room 3-234
Massachusetts Institute of Technology
Cambridge, Massachusetts 02139

Dear Professor Menand:

This is to thank you for your letter of June 19, 1975, and the copy of your letter to the Senate Subcommittee on Constitutional Rights which accompanied it.

I have never been able to understand why Chief Justice Burger said so much about the destruction of the surveillance records acquired by the Army during its spying on civilians in his opinion in *Laird v. Tatum.* The only question before the Supreme Court in that case was the sufficiency of the complaint to state a cause of action. Four of the Justices combined with Justice Rehnquist, who ought to have disqualified himself from participating in the case because he had acted as Counsel for the Defense Department in the hearing before the Senate Subcommittee on Constitutional Rights, held the complaint to be insufficient.

Solicitor General Griswold argued the case for the Defense Department, and repeatedly invoked affidavits which had been offered by the government in the District Court in opposition to a motion of the plaintiff for a temporary restraining order although these affidavits had no relevancy whatsoever to the point being considered by the Supreme Court, as I pointed out to the Supreme Court. Nevertheless, the Solicitor General got away with this, and Chief Justice Burger's opinion is based in large part on what the government said and not on what the complaint alleged.

The suit was a suit for an injunction to prevent threatened injuries. The Chief Justice treated it as if it was a suit for damages, and held that the plaintiff could not maintain the suit unless he could show he had suffered an injury -- instead of the threatened injury which was sought to be averted. I am glad that you have asked for an investigation.

Sincerely yours,

Sam J. Ervin, Jr.

Sam J. Ervin, Jr.

SJE:mm

ATTACHMENT A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, Secretary of Defense, *et al.*,
Petitioners,

—

ARLO TATUM, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

Question Presented

Whether the Court of Appeals was correct in holding that respondents' claim—that unauthorized and extensive surveillance by the United States Army of constitutionally protected civilian political activity is an unconstitutional burden on plaintiffs' exercise of their First Amendment rights—was justiciable under Article III.

ATTACHMENT B

Statement of the Case

The only issue before this Court is whether the complaint states a justiciable claim entitling plaintiffs[1] to a hearing. Because much of the government's Statement of the Case is based upon representations and documents which are not properly part of the record, and because the government ignores many of the material allegations made by plaintiffs, we set out in some detail the allegations of the complaint and the facts which underlie them.

On February 17, 1970, plaintiffs initiated this action on behalf of themselves and others similarly situated challenging the investigation of civilians engaged in lawful political activity by the United States Army (App. 1, 5-12). Plaintiffs complained that their constitutionally protected activities were being investigated "by military intelligence agents, . . . by anonymous informants, and through the use of photographic and electronic equipment" (App. 9), and that the information collected by the Army through such investigation was being "regularly, widely, and indiscriminately circulated . . . to numerous federal and state agencies" (App. 9, 11), published in a "Blacklist" (App. 9), and stored "in a computerized data bank" (App. 9) and "noncomputerized records" (App. 10).

The complaint further alleged that the Army's domestic intelligence operations in the civilian community are unauthorized and overbroad, curtail political expression and debate among civilians, inhibit persons from associating with plaintiffs and thereby injure them and others similarly situated by depriving them of their First Amendment rights of free speech and association and their right peaceably to assemble and to petition the government for redress of grievances (App. 11). Plaintiffs also alleged that the Army's surveillance activities abridge their right of privacy guaranteed by the Fourth, Fifth and Ninth Amendments to the Constitution (App. 8-11).

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[1] Respondents are referred to as plaintiffs throughout this brief.

1. Proceedings in the courts below.

Having filed their complaint on February 17, 1970, plaintiffs filed a motion for a temporary restraining order and preliminary injunction on March 12, 1970, which would require the Army to cease investigating them and to deliver to the court *in camera* all blacklists, publications, records, reports, photographs, recordings, data computer tapes and cards, and other materials maintained by the Army, describing and interpreting their lawful political activities. The motion for a temporary restraining order was denied on March 13. On April 22, plaintiffs appeared before the District Court for an evidentiary hearing on their motion for a preliminary injunction. The court, however, denied their request to proceed with witnesses and documentary evidence (App. 123), denied their motion for a preliminary injunction, and granted the government's motion to dismiss the complaint for failure to state a claim upon which relief could be granted (App. 126, 128). Defendants never filed an answer.

Plaintiffs appealed the dismissal, and on April 27, 1971, the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Wilkey in which he was joined fully by Judge Tamm and in part by Judge MacKinnon, reversed the decision of the District Court on the grounds that the complaint sufficiently stated a cause of action and the controversy between the parties was justiciable (App. 129-48). In remanding the case for full evidentiary proceedings on the motion for a preliminary injunction, the Court of Appeals instructed the District Court to determine (1) the nature and extent of the Army domestic intelligence system, the methods of gathering information, its content and substance, the methods of retention and distribution, and the recipients of the information; (2) what part of the Army domestic intelligence system is unrelated to or not reasonably related to the performance of the Army's statutory and constitutional mission; (3) whether the existence of any overbroad aspects of the intelligence gathering system has or might have an inhibiting effect on the plaintiffs and others similarly situated; and (4) what relief is called for in accordance with the evidence (App. 147-48).

2. Plaintiffs' unchallenged allegations which must be broadly construed and accepted as true in face of the government's motion to dismiss.

A. *Allegations about the plaintiffs and the Army's investigation of their political activities.*

The plaintiffs are four individuals and nine unincorporated associations engaged in lawful political activity, including but not limited to union organizing, public speaking, peaceful assembly, petitioning the government, newspaper editorializing, and educating the public about political issues (App. 6-7). They include government employees,[2] attorneys,[3] clergymen,[4] pacifists and pacifist organizations,[5] veterans of the armed forces,[6] and groups opposed to American involvement in the war in Southeast Asia[7] (App. (6-7). Members of the plaintiff associations also include current and prospective government employees, students, professionals, and others whose status, employment and livelihood are threatened by the Army's maintenance of files and dossiers on their political activities and associations (App. 10). All of the named plaintiffs have been subjects of political surveillance, and all are believed to be subjects of reports, files, or dossiers maintained by the Army (App. 9).

Exhibit A to the complaint is a document entitled, "USAINTC WEEKLY INTELLIGENCE SUMMARY NUMBER 68-12," containing "items of intelligence interest for the period 0600 hrs., Monday, 11 March 68 to 0600 hrs., Monday 18 March 68" (App. 14). This document is a report on the constitutionally protected political activities of plaintiffs and others similarly situated and, upon information and belief, is representative of similar reports prepared weekly by military intelligence units. Such reports were widely and indiscriminately distributed to civilian and military officials within the Department of Defense, to civilian officials in federal, state and local governments, and to each military intelligence unit and troop command in the Continental United States as well as Army headquarters in Europe, Alaska, Hawaii and Panama,[8] and were stored in one or more data banks in the Department of the Army (App. 9, 26-27). Typical of the reports concerning the plaintiffs' activities are the following:

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[2] The American Federation of State, County & Municipal Employees.

[3] Conrad Lynn and Benjamin N. Wyatt, Jr.

[4] Rev. Albert B. Cleage, Jr. and Clergy and Laymen Concerned about the War in Vietnam.

[5] War Resisters League; Arlo Tatum, the Executive Secretary of the Central Committee for Conscientious Objectors; and Women's Strike for Peace.

[6] Veterans for Peace in Vietnam.

[7] The Vietnam Moratorium Committee; the Vietnam Week Committee of the University of Pennsylvania; the Vietnam Education Group; and Chicago Area Women for Peace.

> FRIDAY, 15 MARCH 1968:
> PHILADELPHIA, PA.: A. *THE PHILADELPHIA CHAPTER OF THE WOMEN'S STRIKE FOR PEACE* SPONSORED AN ANTI-DRAFT MEETING AT THE FIRST UNITARIAN CHURCH WHICH ATTRACTED AN AUDIENCE OF ABOUT 200 PERSONS. *CONRAD LYNN,* AN AUTHOR OF DRAFT EVASION LITERATURE, REPLACED YALE CHAPLAIN WILLIAM SLOANE COFFIN AS THE PRINCIPAL SPEAKER AT THE MEET-

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[8] Exhibit A is expressly directed to: "CG FIRST ARMY (THRU 109TH MI GP); CG, THIRD ARMY (THRU 111TH MI GP); CG FOURTH ARMY (THRU 112TH MI GP); CG, FIFTH ARMY (THRU 113TH MI GP); CG, SIXTH ARMY (THRU 115TH MI GP); CG, XVIII ABN CORPS; CG, III CORPS (THRU DCSI FOURTH ARMY); CG, MDW (THRU 116TH MI GP); CG, 1ST ARMD DIV (THRU DCSI FOURTH ARMY); CG, 2D ARMD DIV (THRU DCSI FOURTH ARMY); CG, 82D ABN DIV (THRU XVIII ABN CORPS); CG, 5TH INF DIV (THRU DCSI FIFTH ARMY); CG, USARHAW (THRU 710TH MI DET); CG, FT DEVENS (THRU 108TH MI CP); CO, 902D MI GP (THRU 116TH MI GP); CO 108TH MI GP; CO, 109TH MI GP; CO, 111TH MI GP; CO, 112TH MI CP; CO, 113TH MI GP; CO, 115TH MI GP; CO, 116TH MI GP; CO, 710 MI DET; DIRECTOR ANMCC (PASS TO DIA ELEMENT); USAINTC LNO, PENTAGON." Eleven other recipients are indicated by code (App. 13-14).

> ING. FOLLOWING THE QUESTION AND ANSWER PERIOD ROBERT EDENBAUM OF THE *CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS* STATED THAT MANY PHILADELPHIA LAWYERS WERE ACCEPTING DRAFT EVASION CASES. THE MEETING ENDED WITHOUT INCIDENT.
>
> B. *REV. ALBERT CLEAGE, JR.* THE FOUNDER OF THE BLACK CHRISTIAN NATIONALIST MOVEMENT IN DETROIT, SPOKE TO AN ESTIMATED 100 PERSONS AT THE EMMANUEL METHODIST CHURCH. CLEAGE SPOKE ON THE TOPIC OF BLACK UNITY AND THE PROBLEMS OF THE GHETTO. THE MEETING WAS PEACEFUL AND POLICE REPORTED NO INCIDENTS (App. 17).[9]

B. *Allegations of injury to the plaintiffs.*

Paragraph 15 of the complaint alleges that "[t]he purpose and effect of the collection, maintenance and distribution of the information on civilian political activity described herein is to harass and intimidate plaintiffs and others similarly situated and to deter them from exercising their rights of political expression, protest and dissent from government policies which are protected by the First Amendment by *invading their privacy, damaging their*

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[9] The peaceful political activities of members of the plaintiffs' class are also reported in the Weekly Intelligence Summary, *e.g.*:

> WEDNESDAY, 13 MARCH 1968
>
> BROOKLYN, N.Y.: ABOUT 35 PERSONS PARTICIPATED IN A DEMONSTRATION AT THE MAIN GATE OF FORT HAMILTON TO PROTEST THE SCHEDULED INDUCTION OF PETER BEHR. MANY OF THE PROTESTORS DISTRIBUTED LEAFLETS AND FLOWERS TO PERSONS ENTERING THE FORT. THE DEMONSTRATION LASTED APPROXIMATELY ONE AND ONE HALF HOURS AND ENDED WITHOUT INCIDENT (App. 15).

reputations, adversely affecting their employment and their opportunities for employment, and in other ways" (App. 10) (emphasis added). The specific deterrent induced by the Army's surveillance activities is the plaintiffs' "fear [that] they will be made *subjects of reports* in the Army's intelligence network, that *permanent reports of their activities will be maintained* in the Army's data bank, that *their 'profiles' will appear in the so-called 'Blacklist'* and that all of this information will be *released to numerous federal and state agencies* upon request" (App. 11) (emphasis added).

The government's Statement of the Case ignores these allegations of injury, and attempts through the introduction of highly questionable allegations of fact which have not been subjected to cross-examination in court, to convey the impression that Army surveillance is justified.[10] But in appellate review of a successful motion to dismiss, the plaintiffs' allegations of injury must be broadly construed and taken as true[11] unless they are stated as conclusions of law or are inconsistent or unwarranted deductions of fact.

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[10] Rule 12(b)(6) of the Federal Rules of Civil Procedure states, in part: "If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . ." However, having clearly stated that it was treating the government's motion as one made pursuant to Rule 12(b)(6) (App. 128), the District Court was bound to exclude matters outside the pleadings in determining the sufficiency of the complaint. Wright & Miller, *Federal Practice and Procedure*, § 1356 (1969). To do otherwise would have required the court to give plaintiffs ". . . reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(b)(6). Having failed, therefore, to give plaintiffs such opportunity to be heard, having excluded their witnesses, and having characterized the government's motion as one brought pursuant to Rule 12(b)(6), the District Court could not have admitted the government's affidavits in considering the motion to dismiss. It should be noted that the government filed four affidavits on April 20, 1970, only two days prior to the District Court hearing. Those affidavits are frequently cited in the government's brief.

Specific constitutional injuries to the plaintiffs are legion on the face of the pleadings. Adverse effect on the government employment of members of the plaintiff American Federation of State, County and Municipal Employees stems from their inclusion in Army files and dossiers on civilians "who might be involved in civil disturbance situations"—files which are disseminated by the Army to federal and state agencies (App. 11, 26, 54). Damage to the plaintiffs' reputations is illustrated in the case of Conrad Lynn, a New York attorney experienced in litigation under the Military and Selective Service Act, who is characterized in an Army intelligence file as "an author of draft evasion literature" (App. 17). A similar characterization is made in an Army file with regard to a member of the Central Committee for Conscientious Objectors (App. 17). The characterization of persons, including plaintiffs and members of their class, whose names appear on an Army "identification list" of civilians (App. 9-11, 25, 27), as individuals "who might be involved in civil disturbance situations" (App. 54) constitutes an immediate threat to their employment and damage to their reputations within the precise terms of the complaint (App. 10). Finally, the injuries and threatened injuries to the privacy, employment and reputations of the plaintiffs are visited upon them solely because they have exercised their First Amendment rights, and they are thus deterred from further vigorous exercise of those rights (App. 10-11), in addition to being deprived of their freedom of association with those citizens who are deterred from "free and open discussion of issues of public importance" (App. 11) for fear of becoming a target of defendants' surveillance network (App. 10-11).

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[11] In reviewing the sufficiency of a complaint on a motion to dismiss, this Court has consistently held that "the material allegations of the complaint are taken as admitted." *Jenkins* v. *McKeithen*, 395 U.S. 411, 421 (1969). See also, *California Motor Transport* v. *Trucking Unlimited*, 40 U.S.L.W. 4153, 4155 (January 13, 1972); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 126 (1951).

Since Rule 8(a)(2) of the Federal Rules of Civil Procedure only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," the courts have generally looked with disfavor on Rule 12(b)(6) motions. This is especially true when a "unique" legal theory is propounded (App. 139). See *Shull* v. *Pilot Life Ins. Co.*, 313 F.2d 445, 447 (5th Cir. 1963). In assessing the sufficiency of a complaint, this Court has consistently adhered to the rule enunciated in *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957):

> "In appraising the sufficiency of a complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Therefore, recognizing ". . . that the Federal Rules of Civil Procedure, do not require a claimant to set out in detail the facts upon which he bases his claim," *Conley* v. *Gibson*, *supra*, at 47, the test is whether the material allegations of the complaint, liberally construed, with all ambiguities resolved in favor of the plaintiff, are sufficient to support a claim upon which relief can be granted. See Wright & Miller, *supra*, § 1357, fns. 75-77; Barron & Holtzoff, 1A *Federal Practice and Procedure* § 356, fn. 93 (1960).

C. *Allegations about the scope of the Army's domestic intelligence system.*

Plaintiffs allege and the government does not deny that the Army has stationed intelligence agents in more than three hundred domestic intelligence units throughout the United States (App. 23, 52); that these agents have intruded themselves into civilian politics by monitoring, reporting and interpreting the political and often private activities and associations of civilians (App. 8-10, 23-27); that the Army Intelligence Command maintains an undetermined number of computerized and non-computerized data banks on political protests occurring any place in the United States (App. 9-10, 23); that the information on civilian political protests collected by the Army Intelligence Command has been widely and indiscriminately disseminated to military and civilian agencies of government (App. 9, 27); that the Army Intelligence Command has compiled an identification Blacklist including photographs of civilians "who might cause trouble for the Army" (App. 9, 25); and that Army intelligence agents have infiltrated civilian political organizations[12] and used improper methods to acquire confidential information about private persons[13] (App. 9, 23-24).

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[12] Although the plaintiffs were denied an evidentiary hearing in the District Court, they were prepared to introduce evidence, through the testimony of witnesses who were in the courtroom that Army intelligence agents had infiltrated private social, political and religious groups exercising their freedom of association and their right of privacy. Plaintiffs' counsel made an offer of proof that one such witness, Oliver Allen Peirce, who had served in the Fifth Division, Military Intelligence Detachment at Fort Carson, Colorado, from May 1, 1969 to December 19, 1969, would testify "that he was instructed to infiltrate a group known as the Young Adults Project, an organization composed of a number of church groups in the Colorado Springs area which also included the participation of the Young Democratic organization in the Colorado Springs area; [and] that he was instructed to become a member of this group and to make regular reports on what was going on . . ." (Transcript of Proceedings in the District Court, April 22, 1970, at pp. 29-30).

[13] It is alleged in Appendix B to the complaint, for example, that agents of the 108th Military Intelligence Group in New York City have acquired confidential academic records of students at Columbia University without the knowledge or consent of the students or the University (App. 23-24).

During the two months between the filing of the complaint on February 17, 1970 and oral argument on plaintiffs' motion for a preliminary injunction and on the government's motion to dismiss on April 22, 1970, additional aspects of the Army's surveillance system were revealed through statements made by Army spokesmen under pressure of Congressional inquiry, this lawsuit, and adverse publicity. In letters dated February 25 and 26, 1970 and addressed to plaintiffs' counsel and more than thirty members of Congress (App. 51-55), Robert E. Jordan III, then Army General Counsel, acknowledged that "there have been some activities which have been undertaken in the civil disturbance field which, after review, have been determined to be beyond the Army's mission requirements" (App. 54). Mr. Jordan admitted that the Army Intelligence Command maintained a computerized data bank at Fort Holabird, Maryland concerning civilian political activity throughout the nation (App. 52, 55), and distributed an "identification list which included the names and descriptions of individuals who might be involved in civil disturbance situations" (App. 54).[14]

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[14] Although Mr. Jordan asserted that the Fort Holabird computerized data bank would be "discontinued," he made no reference to duplicate and additional information located at other Army record centers (App. 51-55). He also stated that "[n]o computer data bank of civil disturbance information is being maintained" (App. 55), which the plaintiffs contend was inaccurate. Because of the vagueness of Mr. Jordan's letter, Senator Sam J. Ervin, Chairman of the Constitutional Rights Subcommittee of the Senate Committee on the Judiciary, wrote to the the Secretary of the Army on February 27, 1970 to request further information about the scope of the Army's domestic surveillance system (App. 61-62). Senators Abraham Ribicoff and William Fulbright and Congressman Cornelius Gallagher similarly pressed the Secretary for information (App. 63-65, 74-75).

To answer mounting Congressional criticism, Under Secretary of the Army Thaddeus Beal wrote to Congressman Gallagher and Senator Ervin on March 20, 1970 (App. 76-86). He disclosed the existence of a second "identification list . . . on individuals and organizations" prepared by the Counterintelligence Analysis Division (App. 81). Mr. Beal also acknowledged the maintenance by the Army of microfilm data banks on civilian political activity, and stated that such data banks would continue to be compiled and maintained (App. 81). Apart from these admissions, however, the Under Secretary denied the existence of any other intelligence files. Eight days earlier, however, in their motion papers for a temporary restraining order and preliminary injunction, plaintiffs had specifically charged that the defendants were concealing the existence of:

(1) a second computerized national domestic intelligence data bank, much larger than the one at Fort Holabird, maintained by the Continental Army Command at Fort Monroe, Virginia (App. 48);

(2) regional domestic intelligence data banks including files and dossiers on the political activities of individual citizens and organizations maintained by the First, Third, Fourth, Fifth, and Sixth Armies, and the Military District of Washington, D.C.; and by the 108th, 109th, 111th, 112th, 113th, 115th, 116th, and 902nd Military Intelligence Groups, and the 710th Military Intelligence Detachment, at Fort Devens, Massachusetts; Fort Meade, Maryland; Fort MacPherson, Georgia; Fort Sam Houston, Texas; Fort Sheridan, Illinois; San Francisco, California; and Honolulu, Hawaii, respectively (App. 48);

(3) cards and documents stored at the Headquarters of the Army Intelligence Command from which the Fort Hola-

bird domestic intelligence data bank was organized and made operable (App. 48);

(4) a second blacklist, larger than the first, known as the "Compendium" and published by the Counterintelligence Analysis Division of the Army in two volumes entitled, *Counterintelligence Research Project: Organizations and Cities of Interest and Individuals of Interest,* describing politically active individuals and organizations unassociated with the armed forces or with civil disturbances, but believed by the Army to be sources of "dissidence" (App. 48).

3. Events subsequent to the proceedings in the District Court of which the Court should take notice for the sole purpose of determining the justiciability of plaintiffs' claims.

The government's brief discusses events subsequent to the filing of this lawsuit and facts outside the scope of the proceedings in the District Court for the purpose of bolstering that court's decision. Thus, it claims that the Army's investigative activities have been discontinued and that the files and dossiers resulting therefrom have been destroyed (Gov't. Brief, pp. 9-11, 34). It also argues that the allegations of injury to the plaintiffs are unsubstantiated by facts in the record (*Id.*, p. 20). Whether these contentions spring from the government's desire to broaden the issues before this Court or its unwillingness to have the Court test the sufficiency of the pleadings on their face, the plaintiffs are entitled to present a rebuttal. In doing so they request the Court to take notice of two events subsequent to the District Court proceedings in order to complete the record in this case: (1) the transcript of a hearing on a motion for a preliminary injunction made by members of the plaintiffs' class in a case involving the same subject matter as the case at bar, *ACLU* v. *Westmoreland,* 70 Civ. 3191 (N.D. Ill. 1970), appeal argued *sub nom. ACLU* v. *Laird,* 71-1159 (7th Cir. 1972), and (2) Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92nd Cong., 1st Sess., February 23-25 and March 2-4, 9-11, 15, and 17, 1971 [hereinafter "the Ervin Hearings."][15]

A. *The partial reforms cited by the government do not prove that the Army's investigation of civilian politics has been discontinued and that the files and dossiers resulting therefrom have been destroyed.*

The government's Statement of the Case attempts to convey the impression that the controversy before the Court is moot.[16] Under these circumstances the plaintiffs are entitled to go outside the record to demonstrate that the case is not moot.[17]

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[15] Even for the purpose of deciding issues on the merits, this Court has taken notice of legislative committee reports, *Carolene Products Co.* v. *United States,* 323 U.S. 18, 28 (1944); cf. *Elliott* v. *Home Loan Bank Board,* 233 F. Supp. 578 (N.D. Cal.) rev'd on other gds., 386 F.2d 42 (9th Cir. 1964), cert. denied 390 U.S. 1011 (1965), and may of course take notice of the record in other proceedings within the federal judicial system, *Brown* v. *Board of Education,* 347 U.S. 483 (1954); see also *Paul* v. *Dade County,* 419 F.2d 10 (5th Cir. 1969), *cert. denied,* 397 U.S. 1065 (1970).

[16] The government having injected the issue of mootness into this case, the plaintiffs would be entitled on remand to offer evidence addressed to that issue. The government, therefore, cannot be heard to object to any proof by the plaintiffs that the Army continues to compile and maintain files and dossiers on civilian political activity, Army regulations to the contrary notwithstanding. Cf. *SEC* v. *Rapp,* 304 F.2d 786 (2d Cir. 1962); *Kirk* v. *United States,* 232 F.2d 763 (9th Cir. 1956).

[17] *See* discussion of mootness at pp. 88-91, *infra.*

The vagueness of the Army directives initiating domestic surveillance, and the equivocal directives purporting to reduce it are exhaustively documented in the Ervin Hearings.[18] Contrary to the assertion by the government that Army surveillance focused on "selected public gatherings . . . that were thought to have a potential for civil disorder" (Gov't. Brief, p. 5), surveillance was neither selective, nor restricted to public gatherings, nor limited to even the broadest definition of potential civil disorders.[19] The directives setting up the Army surveillance program were extremely broad, unlike the narrower "family of contingency plans" referred to by the government in its brief (*Id.*), which related only to the logistics of troop movements.[20]

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[18] *See* Ervin Hearings, Part I, pp. 160, 175, 246-47, 258-59, 280-81, 297, 315, 323, 327, 330, 385, 418, 430; Transcript of Proceedings in the District Court, *ACLU* v. *Westmoreland, supra* [hereinafter "*Westmoreland* Transcript"], p. 629. See also the following colloquy, at p. 418, between Senator Ervin and Secretary Froehlke concerning the latter's prepared statement about the scope of Army surveillance:

> Senator ERVIN: This statement states in effect that it was a very unfortunate thing that many of the things which the military did were not spelled out in any kind of written guideline, and many of them were the result of oral orders and many of them were the result of conversations between the military and civilian law enforcement officers. Is that a fair statement?
>
> Mr. FROEHLKE: That is a fair statement.

[19] Ervin Hearings, Part I, pp. 111-12, 176, 247, 263, 265, 267, 299, 317-18, 337, 376; *Westmoreland* Transcript, pp. 249, 257, 619, 758-59, 818, 847-48.

[20] Ervin Hearings, Part I, pp. 111-12, 261, 280-81, 297, 299, 421, 872; *Westmoreland* Transcript, pp. 201-03, 260, 330, 345, 374, 1066. Secretary Froehlke testified, at p. 421 of the Ervin Hearings, that ". . . both the collection plans of February 1, and May 2, [1968] could be interpreted in such a way that would permit surveillance of almost anybody who is active in a community where there was a civil disturbance. Both plans were very broad." Indeed, as former

While the scope of the Army's investigation of civilians was never defined by civilian authorities prior to the initiation of this lawsuit,[21] subsequent attempts by the Army to destroy the fruits of its investigation have been substantially ineffective. The government maintains, for example, that "spot reports"—the raw data of surveillance—are "destroyed 60 days after publication" (*Id.*, p. 10; App. 80), but it does not disclose that the raw data is first transferred to "agent reports," "after-action reports," "biographic reports," and "summaries of investigations".[22] Furthermore, although the investigative data abstracted from spot reports was no longer computerized after February 1970, non-computerized domestic intelligence reports continue to be maintained by the Army.[23] Similarly, the government contends that the identification list[24] was destroyed in February 1970 (*Id.*, p. 10), but fails to explain that the "order . . . to return" (*Id.*) the 300 copies of the list outside the Army was inexplicably changed at the last minute to an order to destroy all copies, which the Hearings testimony shows has not been carried out.[25] Finally, the government

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agent Joseph Levin, Jr. testified, the breadth of the collection plans resulted in even broader instructions to the agents in the field: "It is the nature of the Army system to expand on requirements as each directive travels down the chain of command. . . . [I]ntelligence requirements at field office level rarely bore any resemblance to the order issued from Fort Holabird or even Group Headquarters." *Id.*, p. 297.

[21] Ervin Hearings, Part I, pp. 115, 146, 151, 154, 156, 163, 202, 206-07, 210, 217-18, 322, 454, 462.

[22] *Id.*, pp. 177, 179, 180, 211, 234-35, 238, 264, 331, 390, 465.

[23] *Id.*, pp. 156, 159, 209-10.

[24] *Id.*, pp. 148, 166, 186, 191-92, 207-08, 211-13, 226-27, 249, 266-67, 269, 277, 455-56, 866; *Westmoreland* Transcript, pp. 455, 887-91, 1029.

[25] Ervin Hearings, Part I, pp. 216, 238, 249, 279-80, 394, 428.

points to a policy letter from the Adjutant General as evidence that domestic surveillance "was severely restricted in June 1970" (*Id.*, pp. 9, 45-52). Apart from this bald assertion, however, there is no basis for concluding that the letter eliminated the activities complained of in this lawsuit. Indeed, as Senator Ervin remarked in a letter to the Secretary of the Army, "the exceptions, qualifications and lack of criteria in your policy letter could lead the average citizen . . . to wonder just how much of a change it represents in government policy." [26]

Other errors and omissions in the government's Statement of the Case cast further doubt on its claim that Army surveillance has ceased. The assertion, for example, that "surveillance activity decreased" after the "Spring and Summer of 1968" (*Id.*, p. 9) flies in the face of the most comprehensive of all Army Collection Plans authorizing political surveillance, which was issued in May of 1969.[27]

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[26] Ervin Hearings, Part II, p. 1102. See also *Id.*, Part I, pp. 102, 214-15, 222, 281, 435; *Westmoreland* Transcript, pp. 536, 540, 912.

[27] Ervin Hearings, Part II, pp. 1731-37. The Plan includes, inter alia, the names and identification numbers of the following organizations to be monitored:

American Friends Service Committee (AFSC)	ZB 00 02 00
Americans for Democratic Action (ADA)	ZA 00 17 81
Committee for Non-Violent Action (CNVA)	ZB 00 87 79
Congress of Racial Equality (CORE)	ZB 00 14 77
Clergy and Laymen Concerned About Vietnam (CLCAV)	ZB 50 05 27
Fifth Avenue Vietnam Peace Committee (FAVPC)	ZB 02 12 68
Institute for the Study of Non-Violence (ISNV)	ZB 50 03 86
Interfaith Peace Mission (IPM)	ZB 50 10 64
National Association for the Advancement of Colored People (NAACP)	ZA 00 04 02
National Committee for a Sane Nuclear Policy (SANE)	ZA 00 90 26

(*footnote continued on following page*)

By the same token, the government's claim that political intelligence data and the special identification lists "were kept apart" from the Army's investigative files of "personnel, civilian employees and contractors' employees" (*Id.*, p. 8), cannot withstand evidence that the fruits of Army surveillance can now be found in the investigative files of a host of military and civilian agencies.[28]

B. *Plaintiffs have a right to file supplemental pleadings to substantiate their allegations of injury with facts unknown at the time the complaint was filed.*

Although their allegations of injury are more than sufficient to state a cause of action, plaintiffs would be entitled on remand to file supplemental pleadings to bring their complaint up to date.[29] There are at least five categories of

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Southern Christian Leadership Conference (SCLC)	ZB 00 87 94
Student Non-Violent Coordinating Committee (SNCC)	ZB 01 13 29
Veterans and Reservists to End the War in Vietnam (VREWV)	ZA 02 17 70
Veterans for Peace in Vietnam (VPV)	ZB 02 18 03
Women Strike for Peace (WSP)	ZB 01 36 95

[28] This is understandable in light of testimony in the Ervin Hearings that political intelligence data collected as "civil disturbance information" have been filed in security clearance dossiers. Ervin Hearings, Pt. I, p. 230. See also, *Id.*, pp. 151, 156, 160, 212, 216, 223, 225, 234, 259, 275, 323, 423, 428, 465; *Westmoreland* Transcript, pp. 849-50.

[29] An appellate court may, on proper showing, remand a case expressly for the purpose of permitting a party to file supplemental pleadings under Rule 15(d) of the Federal Rules of Civil Procedure, "setting forth transactions, occurrences or events which have happened since the date of the pleading sought to be supplemented." See, e.g., *Casc-Swayne Co.* v. *Sunkist Grocers, Inc.*, 369 F.2d 449 (9th Cir. 1966); *Southern Pacific Railroad* v. *Conway,* 115 F.2d 746 (9th Cir. 1940).

allegations pertaining to their injury which the plaintiffs can now substantiate in even greater detail with witnesses who testified at the Ervin Hearings and at the evidentiary hearing in *ACLU* v. *Westmoreland*. First, the plaintiffs can prove the Army has conducted surveillance of wholly private activity;[30] second, that the Army's files and dossiers on civilians have been misused and indiscriminately disseminated;[31] third, that their employment or prospective employment within or without the government is jeopardized by such misuse and indiscriminate dissemination of files and dossiers on civilian political activity;[32] fourth, that their reputations have been damaged and defamed by the Army's investigative activities;[33] and finally, that as a result of the Army's investigation of civilian politics, members of the plaintiff organizations have been deterred from continuing their membership and prospective members have been dissuaded from joining.[34]

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[30] Ervin Hearings, Part I, pp. 171, 185, 198, 200-01, 204, 213, 217, 223, 234, 255, 285-86, 290-91, 294-95, 300, 306, 308-09, 387, 445; *Westmoreland* Transcript, pp. 178-79, 205-06, 216-18, 244, 269, 299-300, 311, 359, 373, 515, 560.

[31] Ervin Hearings, Part I, pp. 151, 153-55, 162, 166, 187, 191-92, 195, 211, 224, 234, 266, 270, 319-20, 460, 465; *Westmoreland* Transcript, pp. 103, 156, 179, 214-16, 653, 708, 759, 1016, 1069.

[32] Ervin Hearings, pp. 183, 231.

[33] *Id.*, pp. 131, 141, 183, 232, 266, 342; *Westmoreland* Transcript, pp. 64, 486-87, 498-99.

[34] *See, e.g.*, Ervin Hearings, Part I, p. 231; *Westmoreland* Transcript, pp. 41, 492, 499.

Senator **Biden**. Did the Chairman swear all of you?

Mr. **Askin**. Yes.

Senator **Kennedy**. Just one question.

It has been reported that Senator Ervin after that circumstance regretted his vote in favor of Justice Rehnquist.

Did you ever hear him make that comment?

Mr. **Askin**. That he did not specifically state to me. I know he was quite shocked, disappointed about Justice Rehnquist's participation. That certainly astounded and shocked him.

Senator **Biden**. Without objection.

Ms. Verveer.

Ms. **Verveer**. Thank you, Senator.

STATEMENT OF MELANNE VERVEER

My name is Melanne Verveer, and I am testifying on behalf of the 250,000 members of People for the American Way, a nonpartisan citizens' organization dedicated to protecting constitutional liberties.

I ask that my complete statement be included in the record.

Senator **Biden**. Without objection.

Ms. **Verveer**. I appreciate this opportunity to express our concern to the committee that the Senate exercise fully its constitutional duty to advise and consent on the nomination of Mr. Justice Rehnquist to our Nation's highest judicial post.

The fact that this nominee is a sitting Justice of the Supreme Court does not diminish the Senate's duty in any sense. The role of the Chief Justice is significant, not only in terms of the responsibilities it carries to administer the Court, but also, and perhaps most importantly, in terms of the highest moral and legal leadership that office embodies for the Nation.

A thorough examination of the nominee and a thorough debate of the issues raised by the nomination are required by the Constitution and demanded by the American public.

We strongly believe that the Senate has a role equal to that of the President in determining who shall sit and preside over the Supreme Court.

People for the American Way commissioned Peter Hart Research Associates to conduct a public opinion survey to determine public attitudes toward the American judicial system and the role the Senate ought to play in the confirmation process. That survey was conducted earlier this month.

While the poll results revealed overwhelming approval of President Reagan, a 73 percent favorable rating, 86 percent of respondents said, it is important for the Senate to play an active role in reviewing nominees for Federal judgeships. And only 18 percent believe that the Senate should go along with the President's choice if the nominee is honest and competent.

By a margin of 78 percent to 16 percent, they endorsed the position that it is important for the Senate to make sure that judges on the Supreme Court represent a balanced point of view, rejecting the position that the Senate should let a President put whomever he wants on the Supreme Court, so long as the person is honest and competent.

When asked to assign priorities among a series of qualities judicial candidates should possess, 74 percent stressed being a fair and openminded person who avoids personal prejudice. Seventy-one percent stressed a spotless record of honesty and personal integrity. And 63 percent placed a very high priority on having a strong commitment to insuring that women and minorities have equal rights under the law.

This sampling of the American electorate in 1986 validates the 200-year-old tradition of the Senate in discharging its responsibility for an independent judgment as mandated by the Constitution.

Throughout its history, the Senate has played the active, independent role envisioned by the framers. The confirmation process has never been limited to questions of mere competence and ethical behavior, despite efforts by some to impose those kinds of limitations.

The social, political, and constitutional views of a nominee have a place in this process. They are the very questions considered by the Chief Executive in recommending a nominee.

Perhaps one of the best descriptions of the appropriateness of careful scrutiny was made by Senator Thurmond during the 1968 debate on the elevation of then-sitting justice—of the then-sitting Justice to be a Chief Justice. At that time, Senator Thurmond said: "It is my contention that the power of the Senate to advise and consent to this appointment should be exercised fully. To contend that we must merely satisfy ourselves that he is a good lawyer and a man of good character is to hold to a very narrow view of the role of the Senate, a view which neither the Constitution itself nor history and precedent prescribe. It further serves the end of removing the Supreme Court further away from the democratic process and our system of checks and balances. For these reasons, I believe a most thorough consideration of this appointment is clearly and completely justified."

The Senate must be able to assure the American people that Justice Rehnquist is committed to equal justice under the law, and committed to protecting the cherished constitutional liberties guaranteed by the Bill of Rights.

For the Senate to fail to do so would be a dishonor to the Constitution and a disservice to the Nation.

Senator **Biden**. Thank you very much.

Professor?

[Statement follows:]

People For The American Way

Testimony

of

Melanne Verveer

Vice President
for
Public Policy

People For The American Way

on

the nomination of

William Rehnquist

to be Chief Justice of the
Supreme Court

before

Senate Judiciary Committee

July 30, 1986

I am testifying on behalf of the 250,000 members of People for the American Way, a nonpartisan citizens' organization dedicated to preserving and promoting constitutional liberties. We are concerned that the Judiciary Committee and the Senate fulfill its constitutional duty to "advise and consent" regarding the nomination of Mr. William Rehnquist to our nation's highest judicial post.

The third co-equal branch of the federal government, our judiciary, is responsible for protecting those individual and civil rights guaranteed almost two hundred years ago by the drafters of the Constitution and the Bill of Rights. The Chief Justice of the Supreme Court is the chief guardian of the Constitution. A thorough examination of the nominee and a thorough debate of the issues raised by his nomination are required by the Constitution and demanded by the American public, which strongly believes that the Senate has a role equal to that of the President in determining who shall sit on and preside over the Supreme Court.

This instance is one in which the opinion of the American public solidly reflects our nation's historical tradition. According to a recent national public opinion survey commissioned by People For The American Way, 86% of American voters believe that the Senate should play an active role in reviewing nominees for federal judgeships and make independent decisions regarding judicial nominations. They overwhelmingly reject the proposition that the "Senate should let a President put whomever he wants on the Supreme Court, so long as the person is honest and competent."

The fact that this nominee is a sitting Justice of the Supreme Court does not diminish the Senate's duty in any sense. The role of the chief justice is significant, not only in terms of the responsibilities it carries to administer the Court, to assign opinions, and to significantly shape the Court's docket; but also in terms of the highest moral and legal leadership it embodies for the nation.

This statement provides an historical perspective of the advise and consent process which conveys important instruction on the independent role of the Senate in building the third branch of government. It is a review of the "original intent" of the Founders and the historical role the Senate has played in judicial confirmations, as well as a summary of the thoughts of our nation's finest constitutional scholars and a selected compilation of statements on the confirmation process made by some of our nation's top policy makers, including the nominee currently under consideration. Lastly, the historical analysis is augmented by the results of a national survey of American voters conducted within the past month by Peter Hart Research Associates. We hope that all of these elements will be useful to the Judiciary Committee and ultimately to the Senate in your deliberations.

THE IMPORTANCE OF THE SENATE'S ROLE AND THE NATURE OF ADVICE AND CONSENT

The Senate has an independent constitutional responsibility, co-equal to the President's, in the selection of Supreme Court justices. The President's nomination of candidates to the Court constitutes only half of the required procedure. The Constitution suggests that the Senate's half is to be much more than a rubber stamp function. The authority vested in the Senate provides an important check on the overreaching power of the Executive in shaping the third independent, co-equal branch of government. History confirms the significant role that the Senate has played in restraining overly zealous Presidents through its advice and consent function.

Unlike Executive Branch appointees, judges do not serve at the pleasure of the President; they are not members of the President's cabinet. They serve beyond the duration of any one presidency and are designed by the Constitution to be independent of the President and to be a check upon the power of the Chief Executive.

Because of the unusual power inherent in lifetime appointments, it is "wise, before that power is put in his hands for life, that a nominee be screened by the democracy in the fullest manner possible, rather than the narrowest manner possible, under the Constitution." (Black, Professor Charles, "A Note on Senatorial Consideration of Supreme Court Nominees," 79 Yale Law Journal, pp. 657, 660 (1970).) The Senate brings unique qualifications to the task. While much is made of presidential prerogative to name judges because voters elected the President, it is important to remember that the voters also elected the Senators. The Senate is just as close to the electorate as the President, perhaps more so because it reflects the will of the electorate in a series of elections over a longer period of time. In fact, Professor Donald Lively has accurately pointed out, "The Senate, because it reflects more accurately the nation's diversity, is capable of ensuring a more representative and accountable Court than than the executive." (Lively, 59 Southern California Law Review 551, 565 (1986).)

Professor Laurence Tribe expanded on this theme in his book, God Save This Honorable Court. In Tribe's words, the Senate keeps the Supreme Court from becoming "narrow, isolated and removed from the many and varied threads that make up the rich tapestry we call America." History, as documented in the debate of the First Constitutional Convention and in The Federalist Papers recognized the Senate's unique qualifications (see history below).

The Senate is obligated to give careful scrutiny to all judicial appointments, but its responsibility in the case of Supreme Court appointments is even greater. In a recent letter to the Chicago Tribune, leading constitutional scholar Philip Kurland set forth comprehensive criteria for Senate consideration:

> A federal judge should be qualified by reason of his training in the law, his experience at the bar, his commitment to community service, his breadth of vision and compassion for the human condition, even a little learning, and, perhaps most important, a judicial temperament, which means a recognition that a judge is not a partisan, that his disinterestedness is the essence of his function. And it is here that a zealot or an ideologue fails the test of judicial office. And it is up to the Senate Judiciary Committee to assure itself that a judicial candidate measures up on all scores. The question ought not to be whether a judicial nominee's ideology comports with a President's or a Senator's. It is whether such mode of thought reveals a rigidity which could make a mockery of the rule of law by placing it in the hands of one who could only use it for personal ends rather than those of the Constitution, the laws of the United States, and established judicial precedents.

Meaningful "advice and consent" must include examination of a nominee's judicial, political and social philosophy. If the President is guided by policy considerations in the choice of a nominee, the authority obligated to render advice and consent should address those same concerns.

Joseph P. Harris, in his book The Advice and Consent of the Senate published in 1953, summarized those considerations as follows:

> In making nominations to the Supreme Court, the President, as leader of his party, has necessarily taken political considerations into account, but they have been of a rather different type from those that are controlling in the appointment of judges to lower courts. Conservative Presidents have usually nominated conservatives to the Supreme Court, and liberal or progressive

> Presidents have similarly chosen persons favorable to their programs. There can be no valid criticism of this practice. The Senate, as well as the President, has given primary attention to the philosophy, outlook, attitude and record of nominees to the Supreme Court with regard to social and economic problems of society. The contests that have taken place in the last fifty years over nominations to the Supreme Court have been concerned almost wholly with such issues, though not openly so....
>
> * * * * *
>
> Writing in 1930, Frankfurter strongly defended the action of the Senate in considering the philosophy and outlook of a nominee to the Supreme Court. 'The meaning of "due process,"' he stated, 'and the content of terms like "liberty" are not revealed by the Constitution. It is the Justices who make the meaning. They read into the neutral language of the Constitution their own economic and social views . . . . Let us face the fact that five Justices of the Supreme Court are molders of policy, rather than the impersonal vehicles of revealed truth.' In an often quoted statement, Chief Justice Hughes, when he was governor of New York,. once said: "We are under a Constitution, but the Constitution is what the judges say it is.'
>
> It is entirely appropriate for the Senate, as well as the President, to consider the social and economic philosophy of persons nominated to the Supreme Court. With the changed functions of the Court, considerations of this kind are more pertinent than the legal attainments and experience of nominees....

In 1970, Professor Charles L. Black premised his article on the concept that "a judge's judicial work is ... influenced and formed by his whole life view, by his economic and political comprehensions, and by his sense, sharp or vague of where justice lies in respect of the great questions of his time." Professor Black concluded,

> [T]here is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only be treating this judgment of his, unencumbered by deference to the President's as a satisfactory basis in itself for a negative vote. I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view.

In 1971, a legal memorandum was prepared by law professors Paul Brest, Thomas C. Grey and Arnold M. Paul on the Senate's proper role in considering Supreme Court nominees. The professors reached two general conclusions upon review of the historical precedent:

> 1. There has never been a time when a nominee's social and political viewpoints were not generally considered relevant to his suitability for appointment to the Supreme Court; and
>
> 2. Those Senators who have urged considering and have considered a nominee's substantive views come from no one political camp: they span the range from Whig to Democrat, Republican to Progressive, liberal to conservative.

In conclusion they offered a well-defined standard to be invoked by the Senate:

> [T]he Senate should consider whether a nominee for the Supreme Court has a clear and demonstrated commitment to basic constitutional values. The Supreme Court has the ultimate responsibility of protecting our constitutional system of government. Underlying this system are certain fundamental values, which however changing in scope and meaning for different historical periods, have remained paramount. Among the most basic of these are the rule of law, the protection of individual liberties against arbitrary governmental action, and the equality of man.
>
> Reasonable men, committed to these values, will of course differ as to their scope and as to the proper means of implementing them. This suggests that a Senator should not vote against a nominee because of bare disagreement with him on one or two narrow issues. But where a Senator believes that a nominee's views, as revealed by his past and present statements and actions, depart fundamentally from what the Senator sees as basic constitutional values, it is his constitutional responsibility to vote against confirmation on that ground alone.

More recently in God Save This Honorable Court, Professor Tribe argued that the Senate is constitutionally entitled and obligated to make its own independent judgment about whether confirmation of a Supreme Court nominee would be in the best interest of the country:

> Some constitutional landmarks are so crucial to our sense of what America is all about that their dismantling should be considered off-limits, and candidates who would be at all likely to upend them should therefore be considered unfit.
>
> Such outer boundaries exist on both ends of the traditional political spectrum, and may appropriately look a bit different to each

> member of the Senate. On some boundaries, though, all should be able to agree.

Tribe included within those boundaries support for the Supreme Court's decision in Brown v. Board of Education, the incorporation doctrine, and the principle of "one person, one vote."

Professor Tribe also noted lines of inquiry that would be improper: "Litmus tests that seek out a candidate's unswerving commitment to upholding or reversing a particular legal precedent are simply not an acceptable part of the appointment process."

In summary, Tribe stated:

> Both branches owe a duty to the nation to satisfy themselves that a Supreme Court appointee's scale of constitutional values, on the full range of questions likely to come to the Court in the foreseeable future, represents a principled version of the value system envisioned by the Constitution.
>
> It is by now obvious that Senators cannot intelligently fulfill their constitutional role in the appointment process without knowing where Supreme Court nominees stand on important precedents and issues. Probing questions must be asked, and responsive answers must be given.

In a review of Professor Tribe's book, Duke University law professor Walter Dellinger offered yet another view:

> In deciding whether to consent to a Supreme Court nominee's appointment, a senator certainly ought to probe for evidence of intelligence, integrity and open-mindedness -- a willingness to be persuaded by cogent argument. Whether a senator will also take philosophy into account should depend to a large degree upon whether the president has done so in making the nomination.

Many constitutional scholars, including Professor Dellinger, have argued that consideration of whether the balance of the Court will shift is also a valid consideration and one documented throughout history. According to Professor Dellinger,

> [W]hen a president does attempt to direct the Court's future course by submitting a nominee known to be committed to a particular philosophy, it should be a completely sufficient basis for a senator's negative vote that the nominee's philosophy is one the senator believes would be bad for the country. In making this judgment, a senator should consider the present composition of the Court, and how this appointment would affect the Court's overall balance and diversity. (The New Republic, December 16, 1985, p. 41.)

The debates at the Constitutional Convention and the Federalist Papers confirm that one of the Senate's fundamental functions in confirming judicial nominees is to prevent partisan, ideological court packing by a President determined on remaking the Supreme Court to mirror his views. Candidates who represent a drastic shift in the Court's equilibrium to one extreme are worthy of rejection if a Senator believes the shift would be harmful to the nation. Each Senator has the obligation to consider a nominee in the context of the President's past nominations and intentions on future nominations to fully weigh considerations of balance on the Court.

There is no tradition of Senators refraining from taking into consideration a large range of factors during the confirmation process to fulfill their duty of "advise and consent". To claim otherwise is to reject the lessons of history.

CONSTITUTIONAL HISTORY OF ADVISE AND CONSENT

The intent of the Framers was clearly that the Senate should play an active, independent role in evaluating the Supreme Court nominees. Early in its deliberations, the Convention voted to lodge exclusive power for the appointment of the judiciary in the Senate. Attempts to confer this power on the President or to diminish the role of the Senate were soundly defeated.

Only towards the conclusion of the Convention did the Framers belatedly agree to a co-equal role for the Chief Executive in the judicial appointments process. Governor Morris described the Senate's role in the Convention's final plans as the power "to appoint judges nominated to them by the President."

The debate over ratification of the Constitution, as described in The Federalist Papers reinforces an active Senate role in the appointment of Supreme Court justices.

THE CONSTITUTIONAL CONVENTION

The proceedings of the Constitutional Convention document the Framers' intention to confer on the Senate an active role in the selection of Supreme Court justices.

The first plan, introduced on May 29, 1787, that recommended a mechanism for appointing justices provided that "a National Judiciary be established...to be chosen by the National Legislature." The "Virginia plan" was amended by June 19 to give the Senate the power of appointment, and the provision remained in the draft version of the Constitution throughout most of the Convention.

Arguments during the Convention centered on two alternatives: one in which the power of appointment would rest with the Senate, and another in which the power of appointment would rest with the Executive.

The delegates arguing in favor of Senate appointment feared excessive power in the Executive, saying that appointment by the Executive was a "dangerous prerogative" because it might "even give him [the Executive] an influence over the Judiciary department itself." Furthermore, they were concerned that control of appointment would be "leaning too much toward Monarchy."

Delegates also believed that the legislature, "being taken from all the States" would be "best informed of characters and most capable of making a fit choice." It was argued that the Senate "would be composed of men nearly equal to the Executive, and would of course have on the whole more wisdom. They would bring into their deliberations a more diffusive knowledge of characters. It would be less easy for candidates to intrigue with them, than with the Executive Magistrate."

Proponents for executive appointment argued that it would be advantageous to place the responsibility for appointment in one person and that the President be better informed about the qualifications of potential members of the judiciary.

The debates over the method of appointment of federal judges continued throughout the Convention. Alexander Hamilton argued for a co-equal role for the Senate and President and introduced his resolution on June 5, 1787. James Madison also voiced his concern over empowering the appointment power exclusively in either the Senate or the Executive. On the one hand, Madison said he disliked placing control in the Legislature because it would be too large a body to make appointments. He also believed it would be dangerous to give the Executive sole power. He concluded, however, that he would rather give the power to the Senate, because they would be "sufficiently stable and independent to follow their deliberate judgments." By June 19, the Convention approved a motion that the Justices be "appointed by the second branch of the National Legislature."

The issue was raised again on July 18, when a motion was made referring the appointment of judges to the Executive. This motion failed, 6-2. Another motion, that "judges be nominated and appointed by the Executive by and with the advice and consent of the Second branch" was also rejected.

On July 21, James Madison offered a motion that the Executive nominate judges. The nomination would stand unless disapproved by 2/3 of the Senate. After objections were raised over the 2/3 requirement, Madison amended his motion to "the Executive should nominate, and such nominations should become appointments unless disagreed to by the Senate." The motion failed, 6-3. The Convention then proceeded on a 6-3 vote to retain the clause "as it stands by which the Judges are to be appointed by the Second branch," effectively defeating a passive role for the Senate.

The provision was included in the August 6 draft reported by the Committee on Detail and was later referred to the Committee of Eleven, where the present compromise of co-equal roles for the Senate and President was achieved. On September 7, the Convention adopted the compromise version unanimously.

The compromise underscores the intent of the Framers to give the Senate an active role in the appointment process. Its unanimous adoption indicates that the supporters of exclusive Senate appointment powers were convinced of an equal role for the Senate with the President under the compromise.

FEDERALIST PAPERS

Although the debate over ratification of the Constitution does not provide much detail on the appointment of the judiciary, The Federalist Papers argue for an active Senate role in the process. The Federalist Papers 76 and 77 written by Alexander Hamilton, an advocate of a powerful Executive, addressed appointment to the judiciary and confirmed that the co-equal role for the Senate and Chief Executive would have a salutary effect on the quality of judicial appointments.

In Federalist 76, Hamilton argued that the Senate would be a check on favoritism by the President and would provide stability:

> It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.
>
> It will readily be comprehended that a man who had himself the sole disposition of offices would be governed much more by his private inclination and interests than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body and entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism or an unbecoming pursuit of popularity to the observation of a body whose opinion would have great weight in forming that of the public could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."

In Federalist Paper 77, Hamilton answered the allegation that the Senate might have undue influence over the President: "If by influencing the President be meant restraining him, this is precisely what must have been intended."

Also, in number 77, Hamilton said the Senate would check any excessive Executive power: "In the only instance in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States, would, by that plan, be subjected to the control of a branch of the legislative body."

The Framers clearly intended to give the Senate the authority and responsibility to play an active, independent role in the "advice and consent" process.

THE SENATE ROLE IN PREVIOUS CONFIRMATIONS

Throughout its history, the Senate has played the active, independent role envisioned by the Framers. Indeed, the Senate has refused to confirm nearly one out of every four nominations submitted for its "advice and consent." The Senate's reasons for refusing confirmation have ranged from competence and temperament to constitutional philosophy and political views. The historical record clearly shows that the nominees' social and constitutional viewpoints have been considered relevant to Senate review for appointment to the Supreme Court. Furthermore, these issues, as legitimate concerns in the confirmation process, have been raised by Senators whose views span the political spectrum. The process has never been limited to questions of mere competence and ethical behavior.

As early as the second term of George Washington's administration, the Senate rejected the nomination of John Rutledge to be Chief Justice because he violently attacked the Jay Treaty which was strongly supported by the Federalists. President Madison's nomination of Alexander Wolcott was rejected by the Senate because a majority of the Senate believed that he lacked the necessary legal qualifications for a Supreme Court justice. During the 19th century, only four nominations were rejected for reasons relating to qualification, whereas 17 were rejected for political or philosophical reasons.

In 1930, President Hoover's nomination of John Parker was rejected by a Republican Senate because of his inflammatory racial statements and discredited economic views. Many Senators also were concerned that his appointment could tip the balance on the Court, making it "reactionary."

In recent history, Abe Fortas' nomination was withdrawn after a stormy Senate debate. Thirty-two Senators addressed the question of the nominee's political and constitutional views. Senator Thurmond, for example, argued during the Fortas debate that "the Senate must necessarily be concerned with the views of the prospective Justices or Chief Justices as they relate to broad issues confronting the American people, and role of the Court in dealing with these issues."

Two of President Nixon's nominees were turned back by the Senate. Although alleged ethical improprieties were central to the Haynsworth debate, the nominee's views on labor law and race relations also figured prominently. G. Harrold Carswell, in addition to being considered unqualified, was rejected because of his lack of commitment to equal justice and racial insensitivity.

As even a cursory review of the historical record makes clear, the Senate, in applying its constitutional mandate to "advise and consent," has always acted on a broader criteria than just academic and professional credentials. The Senate's approach has been comprehensive, not restricted and perfunctory.

Because the Constitution offers no standards for Senate review, Senators historically have voted according to what they believed, in their independent judgment, to be in the best interests of the country. In so doing, they have considered the social, economic, political and judicial views of a nominee -- the very questions considered by the Chief Executive in recommending a judicial nominee. The Senate has also weighed the nominees in the context of a President's other appointments to the Supreme Court to ensure philosophical balance on the Court.

THE PERSPECTIVES OF POLICYMAKERS

During the past twenty years, the Senate has deliberated on eight nominations to the Supreme Court, one being the elevation of a sitting Justice to the post of Chief Justice. Five of those nominees were confirmed. During the course of debate and in related comment, the role of the Senate was explored in ways that may be useful to the Senate's current consideration.

During the 1968 debate on the elevation of Justice Abe Fortas to be Chief Justice, Senator Thurmond summarized the appropriateness of careful scrutiny by the Senate:

> Mr. President, the Senate faces an historic and momentous decision in the question of whether or not to recommend the confirmation of the nomination of Justice Abe Fortas to be Chief Justice of the United States. We must each be cognizant of the consequences which are likely to flow from the action we take on this appointment. If the nomination is confirmed, we may well be effecting the policy of the Supreme Court for 20 years or more. Supreme Court Justices are not elected every 2 years -- or every 4 or 6 years. The Supreme Court is not responsive to the democratic process. It is, essentially, the most undemocratic institution in our system of government.
>
> ....Even the most casual student of the Supreme Court must admit that the decisions of the Court affect the lives of Americans in most fundamental ways -- certainly as fundamentally as the decisions reached by Members of Congress or by the President, all of whom are elected by the people. When the Supreme Court makes such decisions we are perilously close to government without the consent of the governed.
>
> Therefore, it is my contention that the power of the Senate to advise and consent to this appointment should be exercised fully. To contend that we must merely satisfy ourselves that Justice Fortas is a good lawyer and a man of good character is to hold to a very narrow view of the role of the Senate, a view which neither the Constitution itself nor history and precedent have prescribed. It further serves the end of removing the

> Supreme Court even further away from the democratic process and our system of checks and balances. For these reasons, I believe a most thorough consideration of this appointment is completely justified.

During the same debate, Senator Ernest Hollings called for an examination of the nominee's philosophy:

> The question before us today is not one of Fortas' ability as a judge or an attorney, for he is obviously a talented one...it is a question of the philosophy of the prospective Chief Justice and the philosophy of the body he aspires to lead. Let's make no mistake about it; the two are inextricably bound.

Senator Sam Ervin was an active participant in the Fortas battle. In a statement for the Judiciary Committee Report on the Fortas nomination, he wrote:

> The Senate's role in the selection of a Supreme Court Justice is plainly equal to that of the President and it is the Senate's constitutional duty to ascertain whether a Supreme Court nominee is qualified in every sense of the word.
>
> The advise and consent power is not limited to academic training, experience and character but extends to the broader question of the nominee's judicial philosophy which includes his willingness to subject himself to restraint inherent in the judicial process.

Senator Ervin had enunciated those principles before. During the confirmation hearings of Justice Potter Stewart, in 1959, he questioned "why the Constitution was so foolish as to suggest that the nominee for the Supreme Court ought to be confirmed by the Senate" if the Senate was "not to be permitted to find out what [the nominee's] attitude is toward the

Constitution, or what his philosophy is." "Just give [the Executive] absolute power in the first place," he concluded.

Senator Fannin relied on a memo by William Rehnquist, then a private attorney, to defend ideological scrutiny of the nominee during the Fortas battle. Mr. Rehnquist's first published remarks on the confirmation process appeared in a 1959 article for the Harvard Law Record:

> The Supreme Court, in interpreting the constitution, is the highest authority in the land. Nor is the law of the constitution just "there," waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the Constitution which have been most productive of judicial law-making - the "due process of law" and "equal protection of the laws" clauses --- are about the vaguest and most general of any in the instrument....
>
> It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for one hundred seventy-five years the constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the laws", then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."

Justice Rehnquist also commented on the Senate's role in a 1975 law review article, entitled "Political Battles for Judicial Independence": "Those on their way to the Supreme Court may be judged by broader standards than merely moral rectitude and legal learning."

During the Senate's deliberations over the nomination of G. Harrold Carswell to the Supreme Court, President Richard Nixon wrote to the Senate attempting to define the Senate's role in the narrowest way possible:

> What is centrally at issue in this nomination is the constitutional responsibility of the President to appoint members of the Court -- and whether this responsibility can be frustrated by those who wish to substitute their own philosophy or their own subjective judgment for that of the one person entrusted by the Constitution with the power of appointment. The question arises whether I, as President of the United States, shall be accorded the same right of choice in naming Supreme Court Justices which as been freely accorded to my predecessors of both parties.
>
> I respect the right of any Senator to differ with my selection. It would be extraordinary if the President and 100 Senators were to agree unanimously as to any nominee. The fact remains, under the Constitution it is the duty of the President to appoint and of the Senate to advise and consent. But if the Senate attempts to substitute its judgment as to who should be appointed the traditional constitutional balance is in jeopardy and the duty of the President under the Constitution impaired.
>
> For this reason, the current debate transcends the wisdom of this or any other appointment. If the charges against Judge Carswell were supportable, the issue would be wholly different. But if, as I believe the charges are baseless, what is at stake is the preservation of the traditional constitutional relationships of the President and the Congress.

President Nixon's interpretation was soundly rejected by the Senate when it voted against the Carswell nomination.

One of the strongest advocates of an equal role for the Senate in the confirmation process was selected to oversee the judicial selection process at the Justice Department under Attorney General Edwin Meese and performed that function until several months ago. In 1983, Grover Rees, then an assistant professor of law at the University of Texas, wrote:

> [T]he Constitution suggests no distinction between the criteria the President should use to `nominate' judges and those the Senate should use in exercising its `advice and consent' function....Both the diction and the sentence structure suggest a process of proposal and disposal rather than a unilateral decision subject to Senate veto only in extraordinary cases....
>
> * * * *
>
> The most obvious reading of the provision for appointment of Justices is that nobody should be appointed to the Court unless the President and a majority of the Senators believe he would be a good Justice. ("Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution," 17 Georgia Law Review 913, (1983).)

In an article in which he argued that the Senate should scrutinize the ideology of Supreme Court nominees, Mr. Rees concluded,

> Whether one accepts a constructionist or a nonconstructionist model of judicial review, a prospective judge's views on constitutional questions ought to be regarded by the President and the Senate as relevant to that

> prospect's qualification for judicial office....
>
> Since the responsibility of Senators to choose good Supreme Court Justices is just as great as that of the President, and since nominees' opinions on constitutional questions are relevant to their qualification, the practice of nominees' refusing to answer such questions should be changed.

In an earlier memo prepared by Rees while serving on the staff of the Senate Subcommittee on Separation of Powers, he argued:

> If a Senator may legitimately vote to confirm or reject a nominee because of the nominee's positions on questions of constitutional law or related questions of social and economic policy --- and especially if, as Black and Rehnquist suggest, a Senator may have a duty to base his vote at least partly on the nominee's views --- then the Senator ought to have some way of ascertaining what these views are.

These statements reflect the view that, although it is the President's prerogative to make appointments that will shape the court according to his philosophy, it is the Senate's responsibility to reject those nominations it does not consider to be in the best interests of the country.

NATIONAL ATTITUDES REGARDING THE SENATE'S ROLE

Support for an independent judgment by the Senate was recently confirmed in a recent survey of the American electorate on this and related issues. People For The American Way recently commissioned a poll to determine public attitudes toward the American judicial system, the standards the public wants applied in the selection of federal judges and the role the Senate ought to play in the confirmation process. The survey was conducted earlier this month by Peter D. Hart Research Associates among a representative sample of the American electorate.

The survey and a complete analysis of the results are appended to the testimony. However, we would like to highlight the key findings, particularly as they relate to the considerations of this committee in reviewing judicial nominations.

While the poll results revealed overwhelming approval of President Reagan - a 73% favorable rating - 86% of the respondents say it is very or quite important for the Senate to play an active role in reviewing nominees for federal judgeships. Only 18% believe the Senate should go along with the President's choice, if the nominee is honest and competent. It is unmistakably clear that American voters want the Senate to be an equal partner with the President in forming the third branch of government.

In describing the role of the Senate, the voters stressed active participation and independence. By a margin of 78% to 16%, they endorsed the position that "it is important for the Senate to make sure that judges on the Supreme Court represent a balanced point of view," rejecting the position that the "Senate should let a President put whomever he wants on the Supreme Court, so long as the person is honest and competent."

Voters surveyed were asked to choose factors that would be valid grounds for opposition to a president's nominee. 83% indicated that statements demonstrating racial prejudice should be disqualifying; cheating in law school (79%); the American Bar Association finding that qualifications are only the bare minimum (68%); conviction for drunk driving (59%); and a commitment to repealing the Supreme Court decision that protects a woman's right to choice on abortion (57%).

When asked to assign priorities among a series of qualities judicial candidates should possess, 74% stressed being a "fair and open-minded person who avoids personal prejudice"; 71% stressed "having a spotless record of honesty and personal integrity" and 63% placed a very high priority on "having a strong commitment to ensuring that women and minorities have equal rights under the law."

By contrast, voters put the lowest priority on ideological considerations. Only 18%, for example, put a high degree of importance on "having a very conservative philosophy on issues" and only 10% stressed the importance of "having a very liberal philosophy." Furthermore, only 22% think that "taking a strong 'pro-life' position in opposition to legalized abortion" should be a high priority.

In short, this sampling of the American electorate in 1986 validates the 200-year-old tradition of the Senate in discharging its responsibility for an independent judgment, as mandated by the Constitution. The survey indicates that the American people, by overwhelming margins, endorse a thorough and independent evaluation of judicial nominees that puts stress on fairness, open-mindedness and a commitment to equal rights. Further, the electorate supports the position that the Senate, through its advise and consent responsibilities, must ensure that justices on the Supreme Court represent a "balanced point of view."

CONCLUSION

In considering the nomination of William Rehnquist to be Chief Justice, the Senate has a constitutional obligation to reaffirm its historic mandate to render an independent judgment, after a thorough review of the nominee's record, as to whether the nomination is in our nation's best interest. The Senate must be able to assure the American people that Justice Rehnquist is committed to equal justice under the law and committed to protecting the cherished constitutional liberties guaranteed by the Bill of Rights. For the Senate to fail to do so would dishonor the Constitution and be a disservice to the nation.

A SURVEY OF ATTITUDES TOWARD THE AMERICAN JUDICIAL SYSTEM

July 1986

Peter D. Hart Research Associates, Inc.
1724 Connecticut Avenue N.W.
Washington, D.C. 20009

Introduction

This report presents the findings of a survey conducted by Peter D. Hart Research Associates, Inc., among a representative sample of the American electorate.

Between July 10 and July 14, 1986, Hart Research conducted telephone interviews with 1,000 adults who report that they regularly vote in federal and state elections. Individual interviews lasted an average of 25 minutes.

Respondents were selected by scientific random sampling techniques and the use of a random-digit dialing system. With a sample of this size, the statistical margin of error at the 95% confidence level is plus or minus 3%.

This survey was commissioned by People for the American Way. The research was supervised by Geoffrey D. Garin, President of Hart Research.

This report conforms with the disclosure standards of the American Association of Public Opinion Research and the National Council on Public Polls.

Overview of Key Findings Concerning The Courts and Court Appointments

Familiarity with the Judiciary

- Three-fifths of all Americans feel they are generally familiar with the workings of the U.S. Supreme Court. Overall, 59% report that they know a lot (21%) or some (38%) about the Supreme Court; 26% say they know just a little about the Court, and 15% say they know hardly anything about it. When asked about their familiarity with the entire federal court system, 51% say they know a lot or some about it, while 32% know just a little or hardly anything about it. The Supreme Court ranks somewhat below the U.S. Congress in voter familiarity; 67% say they know a lot or some about the Congress.

- Large majorities of the electorate indicate familiarity with specific facts about the court system. For example, 80% say they know that there are nine judges on the Supreme Court. Seventy-eight percent say they know that a presidential nominee to the federal courts must be approved by a majority vote of the U.S. Senate. Seventy-eight percent say they know that federal court judgeships are lifetime appointments.

- Despite his recent nomination as chief justice of the Supreme Court, substantive familiarity with William Rehnquist is a distinctly minority phenomenon among the electorate. Sandra Day O'Connor is somewhat more widely known.

  --Just 30% of the voters say they are familiar with William Rehnquist and know something about him, another 28% say they just know his name, and 42% are unfamiliar with his name. Among those with an opinion of Justice Rehnquist, 12% are mainly favorable, 10% are neutral, and 5% are mainly unfavorable.

  --Sixty percent of the voters say they know something about Sandra Day O'Connor, 20% say they just know her name, and 20% say they are unfamiliar with her name. Among those who report an impression of her, 39% are mainly favorable, 16% are neutral, and 3% are mainly unfavorable.

  --Three-fifths of all voters say they know something about Edwin Meese, and 28% say they just know his name; 12% report they are unfamiliar with Mr. Meese's name. Among those with an opinion, 16% are mainly favorable toward the Attorney General, 23% are neutral, and 16% are mainly unfavorable.

Criteria for Court Appointments

- From among twelve considerations, voters place the highest priority on three qualities in the selection of federal judges:

  --Seventy-four percent stress the importance of "being a fair and open-minded person who avoids personal prejudice."

  --Seventy-one percent assign the highest rating to "having a spotless record of honesty and personal integrity."

  --Sixty-three percent place very high priority on "having a strong commitment to ensuring that women and minorities have equal rights under the law."

- Three other factors are rated as highly important by a near majority of the electorate: "having a distinguished record of experience as a lawyer" (46%), "having a distinguished record of service in other judicial positions" (45%), and "taking a strong 'law and order' approach on issues involving law enforcement" (45%).

- Of the twelve considerations presented to them, voters put the lowest priority on ideological considerations. Just 18%, for example, place a high degree of importance on "having a very conservative philosophy on issues," and only 10% stress the importance of "having a very liberal philosophy."

- Just 22% think that "taking a strong 'pro-life' position in opposition to legalized abortion" should be a priority consideration in the selection of federal judges.

The Senate's Role in Judicial Appointments

- The vast majority of voters consistently express support for the ideas that the Senate should play an active role in reviewing a judicial nominee and that it should make an independent decision about whether a president's nominee is in the best interests of the country.

  --Eighty-six percent say it is very or quite important for the Senate to play an active role in reviewing a president's selection for a federal judgeship, including 69% who feel this is very important.

  --When given a choice, 75% say the Senate should make an independent decision about whether the president's selection is in the country's best interests, while only 18% say the Senate should go along with the president's choice if the person is honest and competent.

  --By a margin of 78% to 16%, voters endorse the position that "it is important for the Senate to make sure that judges on the Supreme Court represent a balanced point of view" over the position that "the Senate should let a president put whomever he wants on the Supreme Court, so long as the person is honest and competent."

  --Seventy-eight percent of all voters agree with the idea that "under our system of checks and balances, it would be wrong to give a president too much power to impose his philosophy on the Supreme Court."

- Voters were asked whether each of ten factors would be a valid reason for the Senate to oppose a president's selection for a federal judgeship. Majorities say seven factors would be valid reasons for Senate opposition:

  --"The person has made statements about black people that indicate he is prejudiced against them" (83%);

  --"The person had been caught cheating in law school" (79%);

  --"The American Bar Association has said the person's qualifications are only the bare minimum" (68%);

  --"The person has been a supporter of the Socialist Party" (67%);

  --"The person has been a supporter of the John Birch Society" (62%);

  --"The person has been convicted of drunk driving" (59%);

  --"The person is committed to repealing the Supreme Court decision that protects a woman's right to choice on abortion" (57%).

Using the Abortion Issue as a "Litmus Test" for Judges

- Fully 74% of all voters say they support the Supreme Court decision that "leaves the choice on abortion mainly up to a woman and her doctor, without government interference," while 20% feel this decision should be reversed. Clear majorities among virtually all demographic subgroups support the decision--ranging from 85% among non-fundamentalist Protestants, 80% among voters in white-collar households, and 80% among college-educated voters, to 59% among born-again Protestants, 68% among Catholics, 68% among voters with no education beyond high school, and 69% among blue collar workers.

- By an overwhelming margin of 77% to 14%, voters believe it is a bad idea for a president to "consider only people who believe government should be able to restrict a woman's right to choice on abortion" in making federal court appointments. This includes a 60% majority of the electorate who strongly feel that this is a bad idea. Opposition is the rule throughout the range of subgroups--including Republicans (by 71% to 16%) and conservatives (by 68% to 20%). Even those who believe the Supreme Court's abortion decision should be reversed say, by a margin of 59% to 31%, that it would be wrong to make this position a prerequisite for a court appointment.

Positions on Constitutional Issues

- When asked about the Supreme Court decision that "requires police to inform suspects of their rights, including the right to have a lawyer present when being questioned by the police," 86% say they support this decision and 9% say the decision should be reversed.

- By 71% to 17%, voters say they support the Court decisions that "require the government to maintain a strict separation of church and state." At the same time, however, voters say by 52% to 37% that they favor reversing the decision that "bans officially organized group prayer in the public schools."

- By 46% to 36%, voters support the decisions that "permit employers to use affirmative action hiring goals for minorities and women, to make up for past discrimination."

- Ninety-six percent of all voters agree that "state and local governments should be required to abide by the Bill of Rights."

- By 53% to 38%, voters oppose the assertion that Attorney General Meese "is doing the right thing by using the power of his office to put pressure on stores to stop selling Playboy and Penthouse."

- By 76% to 17%, voters concur that "the Supreme Court should consider changing times and modern realities in applying the principles of the Constitution." By 57% to 34%, voters reject the assertion that "the Supreme Court should only consider the original intent of the Founding Fathers when they wrote the Constitution 200 years ago."

TABLES

A KEY TO THE SYMBOLS USED IN THESE TABLES

(m)	Multiple responses accepted; totals may be greater than 100%.
@	Percentages calculated only on the basis of those respondents who expressed an opinion; "not sure" responses excluded from calculations.
+	Base too small to be statistically reliable.
++	Base too small to be statistically analyzed.
(VOL)	Volunteered response.
NA	Not applicable.

Q.4a. T1

INDICATIONS OF HOW MUCH RESPONDENT KNOWS ABOUT SELECTED BRANCHES OF GOVERNMENT

	A Lot %	Some %	Just A Little %	Hardly Anything %
The U.S. Congress	27	40	25	8
Respondent's state legislature	22	38	27	13
The U.S. Supreme Court	21	38	26	15
Respondent's state and local courts	22	35	30	13
The federal court system	15	36	32	17

Q.4a. T2

INDICATIONS OF HOW MUCH RESPONDENT KNOWS ABOUT THE U.S. SUPREME COURT AND THE FEDERAL COURT SYSTEM

	- - U.S. Supreme Court			- - - Federal Courts - - -		
	A Lot/ Some %	Just A Little/ Hardly Anything %	Not Sure %	A Lot/ Some %	Just A Little/ Hardly Anything %	Not Sure %
All Voters	59	41	-	51	49	-
Republicans	66	34	-	58	41	1
Independents	52	47	1	49	51	-
Democrats	55	44	1	45	54	1
Age 18-24	60	40	-	53	47	-
Age 25-34	58	42	-	52	48	-
Age 35-49	63	37	-	55	45	-
Age 50-64	60	40	-	51	49	-
Age 65 and over	52	47	1	45	53	2
Upper income white collar workers	74	26	-	64	36	-
Lower income white collar workers	67	33	-	56	43	1
Blue collar workers	48	52	-	42	58	-
Retirees	52	46	2	46	53	1
College graduates	77	23	-	68	32	-
Some college	62	37	1	52	47	1
High school or less	45	55	-	39	61	-
Whites	60	40	-	52	48	-
Blacks	49	50	1	47	53	-

Q.5. T3

INDICATIONS OF WHETHER RESPONDENT ALREADY KNEW SELECTED FACTS ABOUT THE FEDERAL COURT SYSTEM

	Already Knew %	Had Not Known Before %	Not Sure %
There are nine judges, or "justices," on the Supreme Court	80	19	1
Once the president selects a person to serve on the Supreme Court and other federal courts, the selection must be approved by a majority vote of the United States Senate	78	21	1
Supreme Court judges and other federal judges are appointed to a lifetime position on the court	78	22	-

Q.5.

T4

INDICATIONS OF WHETHER RESPONDENT ALREADY KNEW SELECTED FACTS ABOUT THE FEDERAL COURT SYSTEM

There are nine judges, or "justices," on the Supreme Court.

	Proportion Who Already Knew %
All Voters	80
Republicans	84
Independents	80
Democrats	77
Age 18-24	86
Age 25-34	75
Age 35-49	84
Age 50-64	78
Age 65 and over	81
Upper income white collar workers	88
Lower income white collar workers	81
Blue collar workers	76
Retirees	79
College graduates	93
Some college	81
High school or less	71
Whites	81
Blacks	74

(cont'd)

Q.5.

T4
(cont'd)

INDICATIONS OF WHETHER RESPONDENT ALREADY KNEW SELECTED FACTS ABOUT THE FEDERAL COURT SYSTEM

Once the president selects a person to serve on the Supreme Court and other federal courts, the selection must be approved by a majority vote of the United States Senate.

	Proportion Who Already Knew %
All Voters	78
Republicans	79
Independents	76
Democrats	78
Age 18-24	72
Age 25-34	75
Age 35-49	79
Age 50-64	77
Age 65 and over	83
Upper income white collar workers	84
Lower income white collar workers	84
Blue collar workers	70
Retirees	79
College graduates	87
Some college	80
High school or less	70
Whites	78
Blacks	74

(cont'd)

Q.5.

T4
(cont'd)

INDICATIONS OF WHETHER RESPONDENT ALREADY KNEW SELECTED FACTS ABOUT THE FEDERAL COURT SYSTEM

Supreme Court judges and other federal judges are appointed to a lifetime position on the court.

	Proportion Who Already Knew %
All Voters	78
Republicans	84
Independents	75
Democrats	74
Age 18-24	75
Age 25-34	70
Age 35-49	80
Age 50-64	79
Age 65 and over	84
Upper income white collar workers	93
Lower income white collar workers	81
Blue collar workers	66
Retirees	80
College graduates	93
Some college	84
High school or less	63
Whites	81
Blacks	56

Q.3.

T5

FAMILIARITY WITH SELECTED PUBLIC FIGURES, AND ATTITUDES TOWARDS THOSE FIGURES AMONG RESPONDENTS WHO ARE FAMILIAR WITH THEM

	Know Something About Public Figure					
	Mainly Favorable %	Neutral %	Mainly Unfavorable %	Not Sure Of Opinion %	Just Know The Name %	Unfamiliar With Name %
Sandra Day O'Connor	39	16	3	2	20	20
Edwin Meese	16	23	16	5	28	12
William Rehnquist	12	10	5	3	28	42

Q.3. T6

FAMILIARITY WITH SANDRA DAY O'CONNOR, AND ATTITUDES TOWARD HER AMONG RESPONDENTS WHO ARE FAMILIAR WITH HER

	- - - Know Something About Her - - - -					
	Mainly Favorable %	Neutral %	Mainly Unfavorable %	Not Sure Of Opinion %	Just Know The Name %	Unfamiliar With Name %
All Voters	39	16	3	2	20	20
Republicans	46	13	2	2	18	19
Independents	32	16	2	3	27	20
Democrats	36	18	4	2	18	22
Age 18-24	35	21	5	4	19	16
Age 25-34	38	15	4	1	19	23
Age 35-49	39	15	3	2	20	21
Age 50-64	38	16	1	2	24	19
Age 65 and over	39	15	3	3	18	22
Upper income white collar workers	55	15	4	3	13	10
Lower income white collar workers	34	20	4	3	19	20
Blue collar workers	29	12	2	2	29	26
Retirees	42	13	3	1	18	23
College graduates	50	19	5	3	11	12
Some college	39	16	2	3	17	23
High school or less	31	13	2	1	29	24
Whites	40	16	3	2	19	20
Blacks	24	12	3	1	30	30

Q.3.

T7

FAMILIARITY WITH EDWIN MEESE, AND ATTITUDES TOWARD HIM AMONG RESPONDENTS WHO ARE FAMILIAR WITH HIM

	- - - Know Something About Him - - - -					
	Mainly Favorable %	Neutral %	Mainly Unfavorable %	Not Sure Of Opinion %	Just Know The Name %	Unfa-miliar With Name %
All Voters	16	23	16	5	28	12
Republicans	28	24	8	3	25	12
Independents	10	28	16	5	30	11
Democrats	9	20	23	5	30	13
Age 18-24	13	19	13	2	29	24
Age 25-34	13	27	12	4	33	11
Age 35-49	16	22	18	5	26	13
Age 50-64	16	23	19	5	27	10
Age 65 and over	19	25	16	6	26	8
Upper income white collar workers	23	29	19	5	18	6
Lower income white collar workers	16	28	16	4	26	10
Blue collar workers	10	19	14	5	35	17
Retirees	14	24	18	3	31	10
College graduates	21	25	27	4	18	5
Some college	17	25	15	6	27	10
High school or less	11	21	9	4	36	19
Whites	17	24	15	4	29	11
Blacks	5	22	22	4	28	19

Q.3. T8

FAMILIARITY WITH WILLIAM REHNQUIST, AND ATTITUDES TOWARD HIM AMONG RESPONDENTS WHO ARE FAMILIAR WITH HIM

	- - - Know Something About Him - - - -					
	Mainly Favorable %	Neutral %	Mainly Unfavorable %	Not Sure Of Opinion %	Just Know The Name %	Unfamiliar With Name %
All Voters	12	10	5	3	28	42
Republicans	20	9	1	2	29	39
Independents	7	8	4	5	30	46
Democrats	7	12	8	3	26	44
Age 18-24	9	4	6	2	26	53
Age 25-34	10	9	4	3	24	50
Age 35-49	12	9	5	2	30	42
Age 50-64	12	12	5	4	31	36
Age 65 and over	14	11	4	4	28	39
Upper income white collar workers	22	12	5	3	30	28
Lower income white collar workers	12	10	7	3	31	37
Blue collar workers	4	6	3	3	26	58
Retirees	13	12	6	3	25	41
College graduates	24	14	7	2	27	26
Some college	8	10	5	5	30	42
High school or less	5	6	3	3	27	56
Whites	13	10	4	3	28	42
Blacks	2	5	6	1	33	53

Q.7. T9

RATINGS OF SELECTED CONSIDERATIONS FOR CHOOSING FEDERAL JUDGES @[1]

	Mean Score #	Very Important (9-10) %	(7-8) %	(5-6) %	Not So Important (1-4) %	(Not Sure %
Being a fair and open-minded person who avoids personal prejudice	8.9	74	19	3	4	(1)
Having a spotless record for honesty and personal integrity	8.8	71	18	7	4	-
Having a strong commitment to ensuring that minorities and women have equal rights under the law	8.5	63	24	9	4	(1)
Taking a strong "law-and-order" approach on issues involving law enforcement	8.1	45	39	12	4	(1)
Having a distinguished record of service in other judicial positions	7.9	45	34	16	5	(1)
Having a distinguished record of experience as a lawyer	7.8	46	31	16	7	(1)
Being rated as highly qualified by the American Bar Association and other lawyers' groups	7.5	33	42	18	7	(1)
Being a religious person who believes in God	6.9	38	21	21	20	(1)
Having a strong commitment to the principle of separation of church and state	6.9	29	32	25	14	(2)
Having a very conservative philosophy on issues	6.0	18	28	32	22	(3)
Taking a strong "pro-life" position in opposition to legalized abortion	5.3	22	16	22	40	(4)
Having a very liberal philosophy on issues	5.2	10	20	37	33	(4)

[1] Based on a ten-point scale on which a rating of "10" means the respondent thinks the quality is very important for consideration in selecting federal judges and a rating of "1" means it is not very important.

Q.7. T10

PROPORTIONS WHO SAY SELECTED CONSIDERATIONS ARE VERY IMPORTANT IN CHOOSING FEDERAL JUDGES, WITH GROUPS MOST AND LEAST LIKELY TO SAY VERY IMPORTANT #[1]

	Proportion Who Say Very Important (9-10) %	Groups Most Likely To Say Very Important:	%	Groups Least Likely To Say Very Important:	%
Being a fair and open-minded person who avoids personal prejudice	74			Age 65 and over	63
				Retirees	65
Having a spotless record for honesty and personal integrity	71	Above-average awareness on courts	80	Age 18-24	61
		Republicans	77	Below-average awareness on courts	63
		Conservatives	76	Liberals	65
		Age 50-64	76	Blacks	66
		Upper income white collar workers	76		
		Reagan voters	75		
Having a strong commitment to ensuring that minorities and women have equal rights under the law	63	Blacks	83	Consistently support presidential discretion	53
		Mondale voters	71	Republicans	58
		Blue collar workers	70		
		Independents	68		
		Liberals	68		
		Retirees	68		
Having a distinguished record of experience as a lawyer	46	Blacks	64	College graduates	37
		Age 65 and over	53	Men	39
		Women	52	Consistently support presidential discretion	41
		Retirees	51	South	41
				Upper income white collar workers	40
Having a distinguished record of service in other judicial positions	45	Above-average awareness on courts	55	Below-average awareness on courts	29
		College graduates	53	Age 18-24	33
		Upper income white collar workers	51	Consistently support presidential discretion	35
		West	51	Age 65 and over	37
				Born-again Protestants	38
				Retirees	39
				High school or less	39
				Moderates	40
Taking a strong "law-and-order" approach on issues involving law enforcement	45	Conservatives	58	Mondale voters	34
		Republicans	56	Liberals	34
		Consistently support presidential discretion	53	College graduates	37
		Above-average awareness on courts	51	Lower income white collar workers	38
		Reagan voters	51	Democrats	38
		Some college	50	Age 25-34	39
Being a religious person who believes in God	38	Born-again Protestants	68	College graduates	22
		Blacks	63	Above-average awareness on courts	23
		Age 65 and over	56	Upper income white collar workers	25
		Retirees	54	Age 18-24	28
		Below-average awareness on courts	51	Age 25-34	29
		High school or less	50	Liberals	30
		Conservatives	49	Catholics	32
		South	48	Northeast	33
		Women	34	Protestants/not born-again	33

(cont'd)

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[1] Based on a ten-point scale on which a rating of "10" means the respondent thinks the quality is very important for consideration in selecting federal judges and a rating of "1" means it is not very important.

Q.7.

T10
(cont'd)

PROPORTIONS WHO SAY SELECTED CONSIDERATIONS ARE VERY IMPORTANT IN CHOOSING FEDERAL JUDGES, WITH GROUPS MOST AND LEAST LIKELY TO SAY VERY IMPORTANT @[1]

	Proportion Who Say Very Important (9-10)	Groups Most Likely To Say Very Important:		Groups Least Likely To Say Very Important:	
	%		%		%
Being rated as highly qualified by the American Bar Association and other lawyers' groups	33	Blacks	49	Catholics	26
		Other Protestants/ not born-again	38	Consistently support presidential discretion	27
				Mixed/neutral on Senate role	28
Having a strong commitment to the principle of separation of church and state	29	West	37	Age 18-24	19
		Mondale voters	36	Below-average awareness on courts	24
		Age 50-64	36		
		Above-average awareness on courts	36		
		Age 65 and over	34		
Taking a strong "pro-life" position in opposition to legalized abortion	22	High school or less	31	Protestants/not born-again	14
		Born-again Protestants	31	Mondale voters	15
		Consistently support presidential discretion	30	College graduates	16
		Age 65 and over	29	Above-average awareness on courts	17
		Conservatives	27	Liberals	17
Having a very conservative philosophy on issues	18	Blacks	32	Above-average awareness on courts	10
		Consistently support presidential discretion	30	College graduates	11
		Age 65 and over	28	Liberals	12
		Born-again Protestants	26	Upper income white collar workers	12
		Below-average awareness on courts	25	Men	13
		Conservatives	25	Age 25-34	13
		High school or less	24		
Having a very liberal philosophy on issues	10	Blacks	23	College graduates	4
		Below-average awareness on courts	17	Above-average awareness on courts	4

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[1] Based on a ten-point scale on which a rating of "10" means the respondent thinks the quality is very important for consideration in selecting federal judges and a rating of "1" means it is not very important.

Q.10a,b,11b. T11

PERCEPTIONS OF HOW IMPORTANT IT IS THAT THE SENATE TAKE AN ACTIVE ROLE REVIEWING THE PRESIDENT'S FEDERAL JUDGESHIP APPOINTMENTS

	Very Important %	Quite Important %	Just Somewhat Important %	Not Really Important %	Not Sure %
All Voters	69	17	10	3	1
Republicans	60	22	13	4	1
Independents	69	18	10	3	-
Democrats	78	12	7	2	1

PERCEPTIONS OF WHETHER THE SENATE SHOULD GO ALONG WITH THE PRESIDENT'S FEDERAL JUDGESHIP APPOINTMENTS OR SHOULD MAKE AN INDEPENDENT DECISION

	Make Independent Decision %	Senate Should Go Along %	Depends (VOL) %	Not Sure %
All Voters	75	18	5	2
Republicans	68	25	5	2
Independents	80	13	5	2
Democrats	78	15	4	3

PERCEPTIONS OF HOW THE SENATE SHOULD DEAL WITH SUPREME COURT APPOINTMENTS

Position A: The Senate should let a president put whomever he wants on the Supreme Court, so long as the person is honest and competent.

Position B: It is important for the Senate to make sure that the judges on the Supreme Court represent a balanced point of view.

	Position A %	Position B %	Some Of Both (VOL) %	Not Sure %
All Voters	16	78	4	2
Republicans	25	69	4	2
Independents	12	82	5	1
Democrats	11	83	4	2

Q.11a.

T12

PERCEPTIONS OF WHETHER SELECTED REASONS FOR SENATE OPPOSITION TO A FEDERAL COURT APPOINTMENT ARE VALID

	Valid %	Not Valid %	Depends (VOL) %
The person has made statements about black people that indicate he is prejudiced against them	83	14	3
The person had been caught cheating in law school	79	18	3
The American Bar Association has said the person's qualifications are only the bare minimum	68	28	4
The person has been a supporter of the Socialist Party	67	29	4
The person has been a supporter of the John Birch Society	62	32	6
The person has been convicted of drunk driving	59	32	9
The person is committed to repealing the Supreme Court decision that protects a woman's right to choice on abortion	57	38	5
The person's philosophy tends to be very liberal, rather than moderate	40	52	8
The person's philosophy tends to be very conservative, rather than moderate	35	56	9
The person's views and legal interpretations tend to put him in a small minority among his fellow judges	30	63	7

Q.11a.

PROPORTIONS WHO SAY SELECTED REASONS FOR SENATE OPPOSITION TO A FEDERAL COURT APPOINTMENT ARE VALID AND NOT VALID, WITH GROUPS MOST LIKELY TO TAKE EACH POSITION

	Proportion Who Say Valid %	Groups Most Likely To Say Valid	%	Proportion Who Say Not Valid %	Groups Most Likely To Say Not Valid	%
The person has made statements about black people that indicate he is prejudiced against them	83	Liberals	89	14	Below-average awareness on courts	22
		Upper income white collar workers	89		Age 65 and over	22
		Lower income white collar workers	89		Retirees	22
		West	88		Blue collar workers	19
		Mondale voters	88			
The person had been caught cheating in law school	79	West	87	18		
		Age 18-24	84			
		Age 25-34	84			
The American Bar Association has said the person's qualifications are only the bare minimum	68	Age 18-24	78	28	Consistently support presidential discretion	44
		Above-average awareness on courts	75		Below-average awareness on courts	35
		Upper income white collar workers	75		Retirees	34
		Blacks	74			
		Mondale voters	74			
		College graduates	73			
The person has been a supporter of the Socialist Party	67	Republicans	77	29	Blacks	40
		Conservatives	74		Mondale voters	40
		Upper income white collar workers	74		Age 65 and over	40
					Age 18-24	37
		Reagan voters	74		Liberals	37
		West	72		Retirees	35
		Age 35-49	72		Democrats	34
The person has been a supporter of the John Birch Society	62	Upper income white collar workers	71	32	Age 18-24	44
					Blue collar workers	41
		College graduates	70		Below-average awareness on courts	40
		Mondale voters	70			
		Liberals	69		Consistently support presidential discretion	40
		West	68			
		Above-average awareness on courts	67		High school or less	39
					Conservatives	38
		Lower income white collar workers	67		Born-again Protestants	38
					South	37

(cont'd)

Q.11a.

PROPORTIONS WHO SAY SELECTED REASONS FOR SENATE OPPOSITION TO A FEDERAL COURT APPOINTMENT ARE VALID AND NOT VALID, WITH GROUPS MOST LIKELY TO TAKE EACH POSITION

	Proportion Who Say Valid %	Groups Most Likely To Say Valid	%	Proportion Who Say Not Valid %	Groups Most Likely To Say Not Valid	%
The person has been convicted of drunk driving	59	Conservatives	66	32	Men	40
		Women	65		Above-average awareness on courts	38
		Below-average awareness on courts	65			38
		High school or less	65		College graduates	38
		Age 65 and over	64		Catholics	38
		Born-again Protestants	64			
The person is committed to repealing the Supreme Court decision that protects a woman's right to choice on abortion	57	Mondale voters	66	38	Conservatives	44
		West	64		Men	44
		Liberals	63		Republicans	43
		Retirees	63		Age 35-49	43
		Protestants/not born-again	62		Catholics	43
The person's philosophy tends to be very liberal, rather than moderate	40	Age 65 and over	50	52	Liberals	66
		Retirees	50		Age 25-34	63
		Born-again Protestants	49		Consistently support presidential discretion	59
		Conservatives	48		Above-average awareness on courts	57
		Republicans	46		Midwest	57
		Mixed/neutral on Senate role	45			
		South	45			
		Age 50-64	45			
		Blacks	45			
The person's philosophy tends to be very conservative, rather than moderate	35	Retirees	46	56	Consistently support presidential discretion	68
		Blacks	46		Age 25-34	66
		Age 65 and over	44		Age 18-24	65
		Women	41		Men	63
		High school or less	40		Upper income white collar workers	63
					Independents	62
					College graduates	62
The person's views and legal interpretations tend to put him in a small minority among his fellow judges	30	Age 65 and over	41	63	Age 18-24	70
		Retirees	41		Blue collar workers	70
		Below-average awareness on courts	35		Northeast	69
		Mixed/neutral on Senate role	35			

Q.6. T14

INDICATIONS OF WHETHER RESPONDENT SUPPORTS OR WOULD REVERSE SELECTED SUPREME COURT DECISIONS

	Support %	Reverse %	Some Of Both/ Depends (VOL) %	Not Sure/ No Opinion %
The decision that requires the police to inform suspects of their rights, including the right to have a lawyer present when being questioned by the police	86	9	3	2
The decision that leaves the choice on abortion mainly up to a woman and her doctor, without government interference	74	20	3	3
The decisions that require the government to maintain a strict separation of church and state	71	17	5	7
The decisions that permit employers to use affirmative action hiring goals for minorities and women to make up for past discrimination	46	36	6	12
The decision that bans officially organized group prayer in the public schools	37	52	6	5

Q.6.

INDICATIONS OF WHETHER RESPONDENT SUPPORTS OR WOULD REVERSE A SELECTED SUPREME COURT DECISION

The decision that leaves the choice on abortion mainly up to a woman and her doctor, without government interference.

	Support %	Reverse %	Some Of Both/ Depends %	Not Sure/ No Opinion %
All Voters	74	20	3	3
Republicans	68	24	4	4
Independents	77	16	4	3
Democrats	76	18	3	3
Men	73	18	4	5
Women	74	21	3	2
Age 18-24	76	19	5	-
Age 25-34	78	18	2	2
Age 35-49	72	21	3	4
Age 50-64	75	17	5	3
Age 65 and over	67	24	3	6
Upper income white collar workers	80	16	3	1
Lower income white collar workers	81	14	2	3
Blue collar workers	69	22	5	4
Retirees	67	25	4	4
College graduates	80	16	2	2
Some college	76	18	4	2
High school or less	68	23	4	5
Born-again Protestants	59	30	5	6
Other Protestants/ not born-again	85	9	3	3
Catholics	68	26	3	3

Q.8. T16

PERCEPTIONS OF WHETHER IT IS A GOOD IDEA FOR A PRESIDENT TO CONSIDER AS FEDERAL COURT APPOINTEES ONLY THOSE WHO BELIEVE GOVERNMENT SHOULD BE ABLE TO RESTRICT A WOMAN'S RIGHT TO CHOICE ON ABORTION

	Good Idea, Feel Strongly %	Good Idea, No Strong Feelings %	Bad Idea, Feel Strongly %	Bad Idea, No Strong Feelings %	Depends (VOL) %	Not Sure %
All Voters	10	4	60	17	4	5
Republicans	12	4	52	19	6	7
Independents	8	3	66	17	3	3
Democrats	10	5	61	16	4	4
Men	10	4	60	18	4	4
Women	11	4	59	17	4	5
Age 18-24	12	4	58	20	2	4
Age 25-34	8	4	68	13	4	3
Age 35-49	11	3	62	17	4	3
Age 50-64	9	4	57	20	5	5
Age 65 and over	15	6	49	16	5	9
Upper income white collar workers	7	5	65	20	2	1
Lower income white collar workers	11	3	59	19	5	3
Blue collar workers	11	3	63	14	3	6
Retirees	13	5	48	18	7	9
College graduates	8	4	62	20	3	3
Some college	8	2	64	15	5	6
High school or less	13	6	54	17	5	5
Born-again Protestants	15	6	54	13	7	5
Other Protestants/not born-again	9	3	60	20	3	5
Catholics	11	5	56	19	4	5

Q.12.

T17

REACTIONS TO A SELECTED STATEMENT

As attorney general, Ed Meese is doing the right thing by using the power of his office to put pressure on stores to stop selling Playboy and Penthouse.

	Agree	Disagree	Not Sure
	%	%	%
All Voters	38	53	9
Republicans	42	51	7
Independents	39	52	9
Democrats	33	55	12
Men	30	63	7
Women	45	44	11
Age 18-24	23	68	9
Age 25-34	29	62	9
Age 35-49	36	58	6
Age 50-64	43	47	10
Age 65 and over	54	31	15
Upper income white collar workers	23	70	7
Lower income white collar workers	38	54	8
Blue collar workers	37	53	10
Retirees	52	35	13
College graduates	29	63	8
Some college	36	55	9
High school or less	44	45	11

Q.12. T18

REACTIONS TO SELECTED STATEMENTS ABOUT THE SUPREME COURT

	In making decisions, the Supreme Court should consider changing times and modern realities in applying the principles of the Constitution			In making decisions, the Supreme Court should only consider the original intent of the Founding Fathers when they wrote the Constitution 200 years ago		
	Agree %	Disagree %	Not Sure %	Agree %	Disagree %	Not Sure %
All Voters	76	17	7	34	57	9
Republicans	72	22	6	36	56	8
independents	77	15	8	32	58	10
Democrats	78	15	7	34	58	8
Men	77	17	6	36	58	6
Women	74	18	8	32	57	11
Age 18-24	79	17	4	38	55	7
Age 25-34	81	13	6	29	66	5
Age 35-49	74	19	7	31	61	8
Age 50-64	77	16	7	31	57	12
Age 65 and over	68	21	11	50	38	12
Upper income white collar workers	79	16	5	27	63	10
Lower income white collar workers	81	13	6	33	61	6
Blue collar workers	78	16	6	35	60	5
Retirees	65	23	12	44	42	14
College graduates	77	17	6	30	62	8
Some college	76	18	6	30	60	10
High school or less	75	17	8	40	52	8

APPENDIX

Peter D. Hart Research Associates, Inc.
1724 Connecticut Avenue N.W.
Washington, D.C. 20009
202/234-5570

Interviewer: 1000 RESPONDENTS
County: July 10-14, 1986
State:

Respondent: Male 50 4-1 Female 50 -2

Study #2414
National--Courts P.C.
July 1986

	AREA	SAMPLE POINT	FORM	DATE
				July ______, 1986
	5	6 7 8	9	10 11

I'm calling from Peter D. Hart Research Associates, the national public opinion polling firm based in Washington, D.C. We are conducting a survey to find out what Americans are thinking on some issues, and I'd really appreciate the chance to get your opinions on a few questions. But first, could you tell me how many men/women age 18 or older live here and are at home now? ________ (write in)

(IF ONLY ONE, BEGIN INTERVIEW. IF MORE THAN ONE, LOOK AT CATEGORY MARKED BELOW AND ASK TO SPEAK WITH THAT PERSON.)

TWO AT HOME
___ INTERVIEW YOUNGER
___ INTERVIEW OLDER

THREE OR MORE AT HOME
___ INTERVIEW YOUNGEST
___ INTERVIEW 2ND YOUNGEST
___ INTERVIEW OLDEST

1a. First of all, could you tell me if you are eligible to vote at this address?

Yes, eligible to vote.....	100	-1	CONTINUE
No, not eligible..........	-	-2	TERMINATE AND
Not sure..................	-	-3	DO NOT COUNT

1b. When there are elections for offices like president, governor, or senator, do you vote in nearly all of these elections, most of them, about half of them, less than half, or hardly any of them?

Nearly all........	71	-1	CONTINUE
Most..............	20	-2	
About half........	9	-3	
Less than half....	-	-4	TERMINATE AND
Hardly any........	-	-5	DO NOT COUNT
Not sure..........	-	-6	TOWARD QUOTA

2a. Generally speaking, how do you feel about the way Ronald Reagan is handling the job of president--do you strongly approve, mildly approve, mildly disapprove, or strongly disapprove?

Strongly approve........	38	-1
Mildly approve..........	35	-2
Mildly disapprove.......	11	-3
Strongly disapprove.....	13	-4
Not sure................	3	-5

2b. Using a scale of 1 to 5, I'd like you to rate your feelings toward the Reagan Administration's approach to a few issues. If you have a lot of confidence in the Reagan Administration's approach on a particular issue, select a number closer to 5. If you have doubts and concerns about the Reagan Administration's approach, select a number closer to 1. You can use any number between 1 and 5 to show how you feel. If you are not sure or have no opinion about a particular item, just say so. (ASK RESPONDENT IF HE/SHE UNDERSTANDS THE SCALE. THEN READ EACH ITEM AND ASK FOR RATING. IF RESPONDENT IS NOT SURE OR HAS NO OPINION ON A PARTICULAR ITEM, RECORD A "6.")

	4+5	1+2	Cannot Rate
Promoting economic growth..........................	46	22	4
Reforming the tax system so it is fair to the middle class..............................	35	37	5
Dealing with the federal budget deficit............	25	40	6
Protecting the civil rights of women and minorities.......................................	34	34	6
Working for nuclear arms control...................	39	35	5
Protecting the environment from toxic wastes.......	26	41	8
Selecting highly qualified judges to the federal courts..................................	41	24	13

3. I'm going to mention the names of a few public figures. For each one, please tell me if you know something about this person, just know the name, or are not familiar with the name. (FOR EACH NAME, BELOW ASK:) How about (READ NAME)--do you know something about this person, do you just know the name, or aren't you familiar with this name?

(IF "KNOW SOMETHING ABOUT THE PERSON," ASK:) Would you say your opinion of (READ NAME) is mainly favorable, neutral, or mainly unfavorable?

A) Edwin Meese

KNOW SOMETHING ABOUT HIM		
Mainly favorable	16	-1
Neutral	23	-2
Mainly unfavorable	16	-3
Not sure of opinion	5	-4
JUST KNOW THE NAME	28	-5
UNFAMILIAR WITH NAME	12	-6

B) William Rehnquist

KNOW SOMETHING ABOUT HIM		
Mainly favorable	12	-1
Neutral	10	-2
Mainly unfavorable	5	-3
Not sure of opinion	3	-4
JUST KNOW THE NAME	28	-5
UNFAMILIAR WITH NAME	42	-6

C) Sandra Day O'Connor

KNOW SOMETHING ABOUT HER		
Mainly favorable	39	-1
Neutral	16	-2
Mainly unfavorable	3	-3
Not sure of opinion	2	-4
JUST KNOW THE NAME	20	-5
UNFAMILIAR WITH NAME	20	-6

(FORM A)

4a. I'd like to find out how familiar you are with some different branches of government--in terms of what they generally do and how they operate. For each one I mention, please tell me if you feel you know a lot about that branch of government, know some about it, know just a little about it, or know hardly anything at all about it. (FOR EACH ITEM LISTED BELOW, ASK:) How much do you feel you know about (READ ITEM)--a lot, some, just a little, or hardly anything at all?

	A Lot	Some	Just A Little	Hardly Anything	Not Sure
The U.S. Congress........	27 -1	40 -2	25 -3	8 -4	- -5
Your state legislature...	22 -1	38 -2	27 -3	13 -4	- -5
Your state and local courts..................	22 -1	35 -2	30 -3	13 -4	- -5
The federal court system.	15 -1	36 -2	32 -3	17 -4	- -5
The U.S. Supreme Court...	21 -1	38 -2	26 -3	15 -4	- -5

4b. What are your main impressions--both favorable and unfavorable--of the U.S. Supreme Court and the decisions it has made in recent years? (PROBE:) In what ways has the Supreme Court had a positive influence? What decisions has it made that you particularly support? (PROBE:) In what ways has the Supreme Court had a negative influence? What decisions has it made that you particularly would want to see changed?

5. Many people know less about the Supreme Court than about other parts of the government, and there are many Americans who are unfamiliar with how judges are appointed to the federal courts. I'm going to read you some facts about the federal court system; for each one, I'd like you to tell me if this is something you already knew or something you may not have known before. (READ EACH ITEM AND ASK:) Is this something you already knew or something you may not have known before?

A) There are nine judges, or "justices," on the Supreme Court.

Already knew.............................	80	-1
Had not known before.....................	19	-2
Not sure.................................	1	-3

B) Once the president selects a person to serve on the Supreme Court and other federal courts, the selection must be approved by a majority vote of the United States Senate.

Already knew.............................	78	-1
Had not known before.....................	21	-2
Not sure.................................	1	-3

C) Supreme Court judges and other federal judges are appointed to a lifetime position on the court.

Already knew.............................	78	-1
Had not known before.....................	22	-2
Not sure.................................	-	-3

6. I'm going to read you some decisions that the Supreme Court has made on various issues. For each one, please tell me if you tend to support this decision or tend to feel the decision should be reversed. If you have no opinion on a particular issue, feel free to say so. (READ EACH ITEM AND ASK:) Do you tend to support this decision or tend to feel the decision should be reversed?

A) The decision that leaves the choice on abortion mainly up to a woman and her doctor, without government interference.

Support......................	74	-1
Reverse......................	20	-2
Some of both/depends (VOL)...	3	-3
Not sure/no opinion..........	3	-4

B) The decision that requires the police to inform suspects of their rights, including the right to have a lawyer present when being questioned by the police.

Support......................	86	-1
Reverse......................	9	-2
Some of both/depends (VOL)...	3	-3
Not sure/no opinion..........	2	-4

C) The decisions that require the government to maintain a strict separation of church and state.

Support......................	71	-1
Reverse......................	17	-2
Some of both/depends (VOL)...	5	-3
Not sure/no opinion..........	7	-4

D) The decision that bans officially organized group prayer in the public schools.

Support......................	37	-1
Reverse......................	52	-2
Some of both/depends (VOL)...	6	-3
Not sure/no opinion..........	5	-4

E) The decisions that permit employers to use affirmative action hiring goals for minorities and women to make up for past discrimination.

Support......................	46	-1
Reverse......................	36	-2
Some of both/depends (VOL)...	6	-3
Not sure/no opinion..........	12	-4

7. There has been a good deal of talk lately about what factors should be considered in appointments to the Supreme Court and the other federal courts. I'm going to read you some possible considerations for selecting federal judges, and I'd like you to rate the importance of each one on a scale of 1 to 10. If you think a particular consideration is very important, pick a number around 8, 9, or 10. If you think a consideration is of medium importance, pick a number around 5 or 6. And if you think a consideration is not so important, you should pick a number around 1, 2, or 3. You can select any number between 1 and 10, but only use the number 10 if you think something is of the utmost importance. (ASK RESPONDENT IF HE/SHE UNDERSTANDS THE SCALE. THEN READ ITEM AND ASK FOR RATING. IF RESPONDENT IS NOT SURE ON A PARTICULAR ITEM, RECORD THE LETTER "A.")

	Median #	9-10	7-8	5-6	1-4
A) Being rated as highly qualified by the American Bar Association and other lawyers' groups	7.4	33	42	18	7
B) Having a strong commitment to the principle of separation of church and state	6.9	29	32	25	14
C) Taking a strong "law-and-order" approach on issues involving law enforcement	7.8	45	39	12	4
D) Having a distinguished record of service in other judicial positions	7.7	45	34	16	5
E) Taking a strong "pro-life" position in opposition to legalized abortion	4.6	22	16	22	40
F) Having a spotless record for honesty and personal integrity	9.1	71	18	7	4
G) Having a strong commitment to ensuring that minorities and women have equal rights under the law	8.7	63	24	9	4
H) Having a distinguished record of experience as a lawyer	7.8	46	31	16	7
I) Being a religious person who believes in God	7.1	38	21	21	20
J) Being a fair and open-minded person who avoids personal prejudice	9.1	74	19	3	4
K) Having a very conservative philosophy on issues	5.6	18	28	32	22
L) Having a very liberal philosophy on issues	4.6	10	20	37	33

8. In making appointments to the federal courts, do you think it is a good idea or a bad idea for a president to consider only people who believe government should be able to restrict a woman's right to choice on abortion? (IF RESPONDENT SAYS "GOOD IDEA" OR "BAD IDEA," ASK:) And do you feel strongly about that?

Good idea, feel strongly......	10	-1
Good idea, no strong feelings.	4	-2
Bad idea, feel strongly.......	60	-3
Bad idea, no strong feelings..	17	-4
Depends (VOL)..................	4	-5
Not sure......................	5	-6

(FORM A ONLY:)

9. What particular concerns would you have if nearly all the judges on the Supreme Court were conservatives? (PROBE:) In what areas do you think a very conservative Supreme Court might make the wrong kinds of decisions or go too far?

(FORM B ONLY:)

9. What particular concerns would you have if nearly all the judges on the Supreme Court were liberals? (PROBE:) In what areas do you think a very liberal Supreme Court might make the wrong kinds of decisions or go too far?

10a. Once the president selects the person he wants to appoint to a federal judgeship, the U.S. Senate must approve the selection by a majority vote. How important do you think it is for the Senate to play an active role in reviewing the president's selection--very important, quite important, just somewhat important, or not really important?

Very important...........	69	-1
Quite important..........	17	-2
Just somewhat important..	10	-3
Not really important.....	3	-4
Not sure.................	1	-5

10b. Generally speaking, do you think the Senate should go along with the president's selection if the person is honest and competent, or do you think the Senate should make an independent decision about whether the president's selection is in the best interests of the country?

Senate should go along...	18	-1
Make independent decision	75	-2
Depends (VOL)............	5	-3
Not sure.................	2	-4

11a. I'm going to read you some reasons that senators might have for opposing a president's selection for a federal judgeship. For each one I mention, please tell me whether or not you think this would be a valid reason for the Senate to oppose a federal court appointment. (READ EACH REASON AND ASK:) Do you think this is a valid reason for the Senate to oppose a federal court appointment?

	Valid	Not Valid	Depends (VOL)	(Not Sure)
A) The person has been convicted of drunk driving........................	59 -1	32 -2	9 -3	(1) -4
B) The person has been a supporter of the John Birch Society..............	62 -1	32 -2	6 -3	(22) -4
C) The American Bar Association has said the person's qualifications are only the bare minimum...............	68 -1	28 -2	4 -3	(6) -4
D) The person is committed to repealing the Supreme Court decision that protects a woman's right to choice on abortion.	57 -1	38 -2	5 -3	(6) -4
E) The person's views and legal interpretations tend to put him in a small minority among his fellow judges....	30 -1	63 -2	7 -3	(10) -4
F) The person has been a supporter of the Socialist Party..................	67 -1	29 -2	4 -3	(8) -4
G) The person has made statements about black people that indicate he is prejudiced against them.............	83 -1	14 -2	3 -3	(3) -4
H) The person had been caught cheating in law school........................	79 -1	18 -2	3 -3	(2) -4
I) The person's philosophy tends to be very liberal, rather than moderate..	40 -1	52 -2	8 -3	(7) -4
J) The person's philosophy tends to be very conservative, rather than moderate..	35 -1	56 -2	9 -3	(8) -4

11b. I'm going to read you two positions people might take on how the Senate should deal with Supreme Court appointments. Please tell me which position comes closer to your own point of view. (READ POSITIONS SLOWLY.)

Position A: The Senate should let a president put whomever he wants on the Supreme Court, so long as the person is honest and competent.

Position B: It is important for the Senate to make sure that the judges on the Supreme Court represent a balanced point of view.

Position A..........	16	-1
Position B..........	78	-2
Some of both (VOL)..	4	-3
Not sure............	2	-4

12. Now I want to read you a few short statements. For each one, please tell me if you tend to agree or disagree with the statement. (READ EACH STATEMENT AND ASK:) Do you tend to agree or disagree?

	Agree	Dis-agree	Not Sure
A) Jerry Falwell and other right wing groups have too much influence over the appointment of federal judges..............	37 -1	36 -2	27 -3
B) State and local governments should be required to abide by the Bill of Rights....	96 -1	2 -2	2 -3
C) In making decisions, the Supreme Court should consider changing times and modern realities in applying the principles of the Constitution.............	76 -1	17 -2	7 -3
D) In making decisions, the Supreme Court should only consider the original intent of the Founding Fathers when they wrote the Constitution 200 years ago..	34 -1	57 -2	9 -3
E) As attorney general, Ed Meese is doing the right thing by using the power of his office to put pressure on stores to stop selling Playboy and Penthouse........	38 -1	53 -2	9 -3
F) Under our system of checks and balances, it would be wrong to give a president too much power to impose his philosophy on the Supreme Court........................	78 -1	15 -2	7 -3
G) The American Bar Association and other lawyers' groups have too much influence over the appointment of federal judges....	34 -1	36 -2	30 -3
H) The Reagan Administration has appointed too many lower court judges who do not meet high standards of excellence...............	29 -1	31 -2	40 -3

FACTUAL INFORMATION : These last few questions are for statistical purposes only.

F1. In what age group are you? (READ LIST.)

18-24......	10	-1	50-64............	24	-4
25-34......	22	-2	65 and over......	16	-5
35-49......	28	-3	Refused..........	-	-6

F2. What type of work does the head of the household usually do? What is the job called? (BE SURE TO CLASSIFY PROPERLY. WRITE JOB DESCRIPTION IN SPACE BELOW. IF HEAD OF HOUSEHOLD IS UNEMPLOYED, GET USUAL OCCUPATION.)

High-level professional.......	7	-1	Skilled labor....	29	-6
Middle-level professional.......	13	-2	Semi- and unskilled labor	4	-7
Executive, manager...	7	-3	Farm, ranch......	1	-8
Sales, proprietor....	10	-4	Housewife........	1	-9
White collar.........	10	-5	Retired..........	18	-0
			Student..........	-	-A
			Other (describe below).........	-	-B

JOB DESCRIPTION: ____

____

F3. (ASK ONLY OF WOMEN.) Do you, yourself, work outside the home full-time, work outside the home part-time, or don't you work outside the home?

Work full-time.....	21	-1	Don't work........	20	-3
Work part-time.....	9	-2	Not sure/refused..	-	-4

F4. What is the last grade of school you have completed?

8th grade or less.	4	-1	Some college.......	17	-4
Some high school..	7	-2	2-year college grad	11	-5
High school graduate........	32	-3	4-year college grad	29	-6
			Not sure...........	-	-7

F5a. What is your religious preference?

Protestant		
Baptist..............................	22	-1
Methodist............................	9	-2
Presbyterian/Episcopalian............	8	-3
Other Protestant.....................	14	-4
Catholic	26	-5
Jewish	2	-6
Latter-Day Saints/(Mormons)	1	-7
Other	8	-8
None/no religion	10	-9

F5b. Would you call yourself a born-again Christian--that is, have you personally had a conversion experience related to Jesus Christ?

Yes...........	30	-1	Not sure........	4	-3
No............	66	-2			

F6. Regardless of how you may vote, how would you describe your overall point of view in terms of the political parties? Would you say you are mostly Democratic, leaning Democratic, completely Independent, leaning Republican, or mostly Republican?

Mostly Democratic.....	27	-1	Leaning Republican	14	-4
Leaning Democratic....	12	-2	Mostly Republican.	19	-5
Completely Independent	26	-3	Not sure..........	2	-6

F7. When you think about your political point of view, would you describe your views as very liberal, fairly liberal, moderate, fairly conservative, or very conservative?

Very liberal....	6	-1	Fairly conservative	23	-4
Fairly liberal..	17	-2	Very conservative..	8	-5
Moderate........	42	-3	Not sure...........	4	-6

F8. Did you get a chance to vote in the 1984 presidential election between Ronald Reagan and Walter Mondale? (IF "YES," ASK:) For whom did you vote--Reagan or Mondale?

Voted--Reagan........................	57	-1
Voted--Mondale.......................	26	-2
Voted--Other/refused/can't recall...	7	-3
Did not vote/can't recall if voted..	10	-4

F9. For statistical purposes only, we need to know your total family income for 1985. I will read you a list of categories and you just tell me which one best represents your total family income.

Less than $10,000.	9	-1	$30,000 to $35,000	10	-6
$10,000 to $15,000	10	-2	$35,000 to $40,000	7	-7
$15,000 to $20,000	10	-3	$40,000 to $50,000	9	-8
$20,000 to $25,000	11	-4	More than $50,000.	12	-9
$25,000 to $30,000	10	-5	Not sure/refused..	12	-0

F10. What is your race?

White.............	86	-1
Black.............	10	-2
Hispanic.........	2	-3
Asian.............	1	-4
Not sure.........	1	-5

May we please have your name and the town in which you live for validation purposes?

RESPONDENT'S NAME: (PLEASE PRINT)

Mr. Mrs. Ms. Miss ____________________
(circle one)

Town: ____________________

Telephone Number: ________/____________________
Area Code

RECORD THE FOLLOWING--DO NOT ASK!

Length of Interview

Less than 10 minutes....................	1	-1
10 minutes to 15 minutes...............	8	-2
16 minutes to 20 minutes...............	23	-3
21 minutes to 25 minutes...............	35	-4
26 minutes to 30 minutes...............	20	-5
More than 30 minutes....................	13	-6

THIS IS A BONA FIDE INTERVIEW AND HAS BEEN OBTAINED ACCORDING TO MY AGREEMENT WITH HART RESEARCH, INC.

Interviewer's Name: (PLEASE SIGN)

____

Interview Number: __________ Interview Date: __________

Time of Interview (o'clock, a.m., p.m.): __________

Validated By: ____________________

Date: ____________________ Sample Point Number: _____

STATEMENT OF GARY ORFIELD

Mr. **Orfield**. Thank you very much, Senator.

I have a statement for the record.

Senator **Biden**. It will be put in the record in its entirety.

Mr. **Orfield**. Thank you.

Mr. Chairman, I am a political scientist at the University of Chicago. My name is Gary Orfield, and I have been studying civil rights for the last 20 years. I participated in the first hearings on Mr. Rehnquist's confirmation.

I am just going to summarize a small part of my written statement. And I am going to try to address several issues about civil rights. To put that in a context I would like to say the reason I think we should pay particular attention to these issues is because we are choosing the leader of the judicial branch of government, the American system of justice. And if there is one thing that that system of justice has as a very special responsibility, it is giving reality to the guarantees that hold true in our system regardless of what the popular majority of the moment thinks, especially for those people who have neither the power nor the resources to protect their own rights without governmental action.

I would like to take several aspects of this question. First of all, on these issues, is Mr. Justice Rehnquist an extremist?

Second, has he shown flexibility as time has gone along? Is there any sign of redemption or improvement in his record?

Third, does he, when he differentiates the levels of protection, in effect actually exclude many other groups, other than blacks, from any kind of real constitutional protection.

Fourth, in the area of civil rights itself, even though he says policies should have strict scrutiny, has he adopted a series of devices, in terms of access to courts, standards of proof, standards of remedy, and so forth, which, in effect, mean that even when you have a violation you cannot get a remedy from the court? So that the right actually recedes into relative insignificance.

Are there, in his opinions, signs that he is really very insensitive, and primarily is looking to protect and represent the rights of whites in American society?

When Justice Rehnquist appeared before the Committee in 1971, and again today, he quoted Felix Frankfurter who said that if putting on the robe does not change a man, there is something wrong with that man.

We all know what Mr. Rehnquist's opinions were before be went on the Supreme Court. He was opposed to civil rights; it is perfectly clear. When he went on the court, did he change?

When he went on the court, according to the tabulations of the Harvard Law Review, and a variety of other articles, including one from a University of Delaware professor, Senator Biden, he immediately went to the extreme right in the voting patterns of the court, and he has remained there every term since he has been on the court.

It did not change. It was perfectly consistent with his political values before he went on the court.

His votes became extremely predictable in many areas of policy. Nine out of ten times women came claiming discrimination before the court, he voted no; he did not recognize the rights.

Nine out of ten times police and law enforcement officials came to the court, he voted yes for their side of the conflict of rights.

In the cases of claiming rights for illegitimate children, he simply did not recognize them at all. He believed that there was always justification for the discrimination.

In the area of civil rights, Justice Rehnquist believes that the Fourteenth Amendment does address civil rights issues, at least those that existed in the 1860's. It is very unclear about whether he believes that they address any of the more recent problems that have developed in our society as we have become an urban society, and as we have become a very complex, much more multiracial society, and inequality has grown in many dangerous ways.

There is a consistent record in his civil rights decisions of a lack of sympathy, of a lack of understanding about the problem that is really there, of a treatment of those questions as if they were intellectual puzzles rather than very serious human problems, and adoption of many kinds of ideological, technical and philosophic devices that almost always result in the plaintiffs losing.

Now, I think it is very important to understand several things. First of all, for plaintiffs other than blacks, they lose at the beginning because he believes that they should only get a rational basis level of scrutiny, and there has only been one case since the 1930's where the Court has applied that standard and the plaintiffs have won. So that if you choose the rational basis standard of scrutiny, you just lose; you are gone.

Now if you choose the so-called strict standard, as it is applied by Justice Rehnquist, you lose anyway if you are a black plaintiff, because you lose on the standard of proof. He wants you to prove every single individual was intentionally discriminated against, every single school was intentionally built segregated, and prove it without any doubt, and not look at just the results but try to get a confession; and even then to limit the remedies very drastically.

Now one of the most disturbing things about his opinions as I read through scores of the dissents the last few weeks is that there is an almost hysterical tone in the opinions, especially on school desegregation and affirmative action, where he adopts phrases like "integration uber alles," quoting or comparing a decision to the Nazi anthem. Or where he says that an affirmative action decision is something out of Orwell's 1984, and it is a big lie, and there is doublespeak. It is not judicial language; it is political language. And it is a language of looking at the conflict from a white standpoint.

There is a terrible insensitivity in the description of the problems that are brought to the Court, and an extremely overactive opposition that often embraces what you would see in the vocal white resistance to civil rights policy.

There does not seem to be any concern about what the result is for the minority plaintiffs who have proven a violation. If the remedy does not work, that does not matter. The remedy has to be limited; the power of the courts has to be limited; and it is extraordinarily difficult to get any kind of remedy.

In my estimation, having been involved in more than a dozen major school desegregation cases, it would be impossible ever to desegregate a school system under the standards that Mr. Rehnquist has set up.

Most major school systems in the country that have desegregation plans in urban areas would go back to segregated schools under these standards.

I think that this is the kind of thing we are talking about; a very far-reaching, extremely conservative, very consistent and very hostile record. Not that it is not sincerely believed in, and not that Mr. Rehnquist is not a wonderful person.

The logic of his philosophy means that the plaintiffs lose in equal rights cases.

I would like to submit for the record an article by professor Sue Davis of the University of Delaware, called Justice Rehnquist's Equal Protection Clause, from the Nebraska Law Review. She reviews many of these decisions and shows how systematically the plaintiffs lose in each of these areas.

The CHAIRMAN. Without objection, so ordered.

Thank you very much.

[Nebraska Law Review article and prepared statement follows:]

Sue Davis[*]

Justice Rehnquist's Equal Protection Clause: An Interim Analysis

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I. INTRODUCTION

More than a decade has passed since William H. Rehnquist became an Associate Justice of the United States Supreme Court. The Court's most conservative member, with a propensity toward dissenting alone, Rehnquist has often been perceived by Supreme Court observers as somewhat isolated—a Justice whose views are not likely to be accepted by a majority of the Court.[1] Belying such an image, however, is the fact that Rehnquist has written the opinion in many important cases, that he and Chief Justice Burger often vote together, and that when he and the Chief Justice are in the majority, the Chief Justice is quite likely to assign the opinion to Rehnquist. Moreover, with five Justices over the age of seventy currently serving on the Court, it is likely that there will be one or more new Supreme Court Justices within the next few years who will share Rehnquist's ideological persuasion. Indeed, it is possible that Rehnquist may emerge in the near future as the leader of a dominant conservative bloc of the Supreme Court.

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[1] Rydell, *Mr. Justice Rehnquist and Judicial Self-Restraint*, 26 HASTINGS L.J. 875, 876 (1975).

The purpose of this article is twofold: first, it seeks to clarify Rehnquist's judicial philosophy by analyzing his equal protection opinions, and second, it attempts to determine whether his influence among the other members of the Court is expanding. Justice Rehnquist has offered explanations of his judicial philosophy in public addresses as well as in his judicial opinions. The article entitled, *The Notion of a Living Constitution*[2] (hereinafter referred to as *The Living Constitution*), is Rehnquist's most explicit statement of a judicial philosophy based on a belief in the democratic nature of the United States' Constitution. In Rehnquist's view, the Constitution gives the popularly elected branches of government, not the judiciary, the responsibility of balancing rights and interests, and of determining the goals of the political system. Such a perception of the American constitutional system provides the theoretical basis for Rehnquist's approach to constitutional interpretation.

This article compares the views expressed in Rehnquist's article, *The Living Constitution*, with Rehnquist's equal protection opinions in order to demonstrate that Rehnquist has a coherent judicial philosophy that is reflected in his judicial opinions. In order to test the hypothesis that Rehnquist's influence among the other justices is increasing, this article analyzes the Supreme Court's voting in the equal protection cases in which Rehnquist has participated. Also, an analysis of Rehnquist's judicial philosophy requires that a brief overview of the Supreme Court's equal protection jurisprudence be given.[3]

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[2] Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

[3] Section II of this article provides a brief overview of the Supreme Court's equal protection jurisprudence as a background for Rehnquist's approach to equal protection. For extensive analyses of the equal protection doctrine, see A. BONNICKSEN, CIVIL RIGHTS AND LIBERTIES: PRINCIPLES OF INTERPRETATION ch. 5 (1982); Barret, *Judicial Supervision of Legislative Classifications—A More Modest Rule for Equal Protection?*, 1976 B.Y.U. L. REV. 89; Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 1979 COLUM. L. REV. 1023; *Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645 (1975).

II. MODERN EQUAL PROTECTION DOCTRINE

The United States Supreme Court's use of the due process clause during the early years of the twentieth century (to scrutinize and often to invalidate federal and state laws regulating the economy) provided the foundation for the later emergence of the equal protection clause as an important tool of judicial intervention. Chief Justice Stone's well-known "fourth footnote" in *United States v. Carolene Products Co.*,[4] signaled the Court's withdrawal from an intensive review of economic regulations and its movement toward the more lenient standard of "rational review." Stone's footnote also suggested an increased scrutiny of legislation infringing on the rights specifically protected by the Constitution, as well as the rights of "discrete and insular minorities."[5] Therefore, Stone's footnote in *Carolene Products* provided the basis for the development of the Court's double standard: deference to legislative decisions in the economic realm but activism in the area of personal rights. When Justice Douglas used the equal protection clause in *Skinner v. Oklahoma*[6] to invalidate a state law that provided for compulsory sterilization after multiple convictions for certain types of felonies, he emphasized that such legislation interfered with the fundamental liberties of marriage and procreation. In *Korematsu v. United States*,[7] Justice Black made explicit the notion that race is a suspect classification and, therefore, requires the most stringent standard of review.[8]

Justice Stone's footnote in *Carolene Products*, Douglas's emphasis on fundamental rights in *Skinner*, and Black's reiteration, in Korematsu, that race is a suspect classification, provided the framework for what was to become the Warren Court's two-tier approach to equal protection: the traditional "rational basis" test, which required only that a classification be rationally related to achieving a legitimate end when economic regulations were challenged; and the "strict scrutiny" test, which required that a classification be the only means of achieving a compelling state interest when the challenged legislation involved racial classifications or fundamental rights.

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[4] 304 U.S. 144 (1938).

[5] The fourth footnote of *Carolene Products* reads:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities maybe a special condition, which tends, seriously, to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

304 U.S. 144, 152 n.4 (citations omitted).

[6] 316 U.S. 535 (1942).

[7] 323 U.S. 214 (1944).

[8] *See* Strauder v. West Virginia, 100 U.S. 303, 307-08 (1879) (suggesting for the first time that race may be a suspect classification).

Chief Justice Earl Warren, in describing the traditional rationality standard in *McGowen v. Maryland*,[9] stated:

> The Fourteenth Amendment permits the States a wide scope for discretion in enacting laws which affect some groups of citizens differently than others. The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.[10]

The fact that the rational basis test has resulted in the invalidation of only one classification since the 1930's,[11] reveals the deferential, inconsequential nature of the requirement of "rationality." In contrast, the strict scrutiny test has been characterized as "strict in theory, fatal in fact."[12] As Chief Justice Warren stated in *Loving v. Virginia*,[13] "if [racial classifications] are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[14] In short, with the two-tier approach, the Court's choice of the tier virtually predetermines the result.

Race was clearly one suspect classification that demanded strict scrutiny; but the Warren Court suggested that there might be additional suspect classifications—illegitimacy and wealth, for example.[15] The Court has also used the strict scrutiny test to invalidate legislative classifications which infringe fundamental interests. Such interests include: interstate travel,[16] voting,[17] criminal appeals,[18] and marriage.[19] In addition, the Warren Court issued tantalizing statements during the 1960's implying that there might be additional fundamental interests, such as welfare benefits, housing, and education, yet to be found within the text of the Constitution.[20]

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[9] 366 U.S. 420 (1961).

[10] *Id*. at 425-26.

[11] Morey v. Doud, 354 U.S. 457 (1957), *overruled*, City of New Orleans v. Dukes, 427 U.S. 297 (1976).

[12] G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 611 (10th ed. 1980).

[13] 388 U.S. 1 (1976).

[14] *Id*. at 11.

[15] In Levy v. Louisiana, 391 U.S. 68 (1968), and Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), the Court invalidated state laws that distinguished between legitimate and illegitimate children for the purpose of recovering death benefits. Although the Court in *Levy* expressly used the rational basis test, Justice Douglas suggested that illegitimacy might be considered suspect when he stated: "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly

Although the Burger Court has not rejected the fundamental interests concept established by the Warren Court, it has refused to extend this strand of equal protection beyond those fundamental interests established during the 1960's.[21] In particular, the Court has refused to extend the suspect label to classifications based on illegitimacy and sex. The Burger Court has, however, added a third standard of review to the Warren Court's two-tier approach: an intermediate standard that falls between the maximum scrutiny standard, which is demanded when racial classifications are challenged, and the minimum scrutiny standard, which is required when economic regulations are involved. The Burger court has used this intermediate standard to invalidate legislative classifications based on illegitimacy and sex without actually declaring those categories to be suspect. In doing so, the Court has held that classifications based on illegitimacy and sex must be substantially related to an important governmental interest.[22] This intermediate

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'persons' within the meaning of The Equal Protection Clause . . . ." Levy v. Louisiana, 391 U.S. 68, 70 (1968). Regarding wealth as a suspect classification, Justice Douglas stated: "Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (citations omitted).

[16] *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

[17] *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[18] *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[19] *See* Loving v. Virginia, 388 U.S. 1 (1967).

[20] Much of the speculation about the possible expansion of fundamental interests arose over dicta contained in Shapiro v. Thompson, 394 U.S. 619 (1969). Justice Brennan's majority opinion in *Shapiro* interpreted the facts of the case as involving a denial of "welfare aid upon which may depend the ability of the families to obtain their very means to subsist—food, shelter, and other necessities of life." *Id.* at 627. Justice Harlan's dissent criticized Brennan's "cryptic suggestion, . . . that the 'compelling interest' test is applicable merely because the result of the classification may be to deny the appellees 'food, shelter, and other necessities of life'. . . ." *Id.* at 661.

[21] In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), Justice Powell stated that wealth was not a suspect classification and education was not a fundamental interest.

[22] For example, in Craig v. Boren, 429 U.S. 190 (1976), Justice Brennan stated that "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and

standard has not been accepted by all members of the Court; indeed, in those cases where the standard has been applied, the results have not been predictable. However, the intermediate standard has been regarded as one of the important innovations of the Burger Court, providing a realistic, flexible method of judging classifications based on legitimacy and sex.[23] Rehnquist, however, has remained adamantly opposed to the three-tier approach, preferring instead to adhere to his own version of the traditional two-tier analysis, i.e., that minimum scrutiny should be applied to all classifications except those based on race, and that the Court should carefully avoid the use of the maximum scrutiny test, even where racial classifications are involved. The basis for Rehnquist's opposition to the intermediate standard, as well as the basis for Rehnquist's judicial philosophy, has been articulated in his article, *The Living Constitution.*[24]

III. *THE LIVING CONSTITUTION*

In *The Living Constitution*, Rehnquist quotes Abraham Lincoln's first inaugural address to capture the essence of his judicial philosophy:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned their government, into the hands of that extent tribunal.[25]

Rehnquist develops this theme throughout his article, presenting a view of the Constitution that is consistent with Lincoln's indictment of what Lincoln believed to be judicial usurpation of the democratic process.

Three closely related, and perhaps overlapping, premises can be identified in Rehnquist's professed judicial philosophy. The first premise is that the American political system, as envisioned by the framers of the Constitution and established by the Constitution, is a democracy. Second, in a democratic system, laws must be made according to the established process rather than imposed

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must be substantially related to [the] achievement of those objectives." *Id.* at 197.

[23] Justice Marshall's "sliding scale" approach, which was first articulated in Dunn v. Blumstein, 405 U.S. 330 (1970), and elaborated in his dissent in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), reveals the inadequacies of the two-tier approach. Marshall refers to the Court's equal protection analysis as a spectrum of standards.

[24] Rehnquist, *supra* note 2.

[25] *Id.* at 702 (quoting THE COLLECTED WORKS OF ABRAHAM LINCOLN 268 (R. Basler ed. 1953)).

from outside the political arena. The third premise is that the only "democratic" method of interpreting the Constitution is to examine the words of the document and to interpret those words in conformity with the original intention of the framers of the Constitution. Taken together, these three premises prescribe a very limited judicial role in interpreting the Constitution. In fact, judicial review comes to be viewed as counter-majoritarian and ultimately as an undesirable obstacle to the democratic process.

Rehnquist views the Constitution as a democratic document, a document which represents the original will of the people as described by Chief Justice John Marshall in *Marbury v. Madison*.[26] But, while Marshall applied the notion of the Constitution as reflecting the original will of the people to defend judicial review (arguing that the judiciary was responsible for interpreting and giving meaning to the Constitution), Rehnquist uses this notion to limit and ultimately to condemn judicial intervention in the acts of other branches of government. Marshall, writing in 1803, was close enough in time to the ratification of the Constitution to argue convincingly that the Constitution was genuinely a fundamental charter that had emanated from the people.[27] Today, Rehnquist argues that judges are no longer guardians of the Constitution; instead, they constitute "a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers, concerning what is best for the country."[28] The judiciary has become the destroyer of democracy rather than its protector.

In Rehnquist's view, it is not the proper function of the judiciary to keep the political system in tune with the times; the Constitution gave this responsibility to the popularly elected branches of government. Moreover, while the limits placed on state and federal governments were designed to ensure that the government would not transgress the rights established in the Constitution, these limits should be viewed as procedural constraints rather than substantive directives. Although the Constitution provided for the separation of powers, it did not obligate the government to solve substantive problems—Congress, the Presidency, state legislatures and governors have the authority to choose not to take action to resolve problems. In Rehnquist's view, the judiciary's role becomes one of simply ensuring that the other branches of government do not go beyond the explicit limits of the authority vested in them by the Constitution, not one of judging the substance of their policies.

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[26] 5 U.S. 137 (1803).
[27] Rehnquist, *supra* note 2, at 697.
[28] *Id*. at 698.

The second premise of Rehnquist's argument in *The Living Constitution* has been characterized as a relativistic theory of constitutional interpretation.[29] Essentially, Rehnquist argues that no value can be demonstrated to be intrinsically superior to any other. A particular value is authoritative only when it is favored by a majority of the Court. Rehnquist states: "The laws that emerge after a typical political struggle in which various individual judgments are debated likewise take on a form of moral goodness because they have been enacted into positive law."[30] Although the people may have strong, deeply felt values, those values remain merely personal until they become law, either by legislation or by Constitutional amendment. The minority has no authority to impose its value judgments on the country, even if the minority happens to be the Supreme Court. This element of Rehnquist's judicial philosophy constitutes a moral relativism that ultimately rests on majority rule to define society's values. As its necessary corollary, this theory removes from the judiciary the responsibility of keeping popular opinion in check. It does not consider the possibility that the majority may be wrong; rather, it denies the notion of the existence of natural law or rights. In essence, Rehnquist's relativism would lead to the rejection of the Supreme Court's role as the guardian of individual rights against an unjust or errant majority.

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Finally, Rehnquist's approach to constitutional interpretation has also been aptly characterized as immanent positivistism.[31] His method of interpreting the Constitution is to rely on the words and clauses of the document itself, confining their meaning to the words of that text. Where the words do not suffice, he searches for the intent of the framers of the Constitution. As Walter Murphy has articulated, there are numerous problems with such an approach.[32] For example, it is questionable whether the true intent of the framers can ever be adequately discerned. However, such problems have not seemed to have deterred Rehnquist's emphasis on the American political system as a democracy, or on moral relativism and immanent positivism as an approach to interpreting the Constitution. Together, these theories add up to a philosophy of judicial restraint or, possibly, of wholesale judicial abdication of the Court's review power to the popularly elected branches of government.

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[29] Justice, *A Relativistic Constitution*, 52 U. COLO. L. REV. 19 (1980).

[30] Rehnquist, *supra* note 2, at 704.

[31] Harris, *Bonding Word and Polity: The Logic of American Constitutionalism*, 76 AM. POL. SCI. REV. 34 (1982).

[32] *See, e.g.*, Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980); Murphy, Book Review, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?*, 87 YALE L.J. 1752 (1978).

IV. REHNQUIST'S RATIONALITY REQUIREMENT: "FACILE ABSTRACTIONS . . . TO JUSTIFY A RESULT"

Justice Rehnquist has described the Supreme Court's decisions, with the exception of those involving classifications based on race, as "an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principles."[33] His scrupulously crafted dissents have proliferated in response to the majority's propensity toward invalidating legislative classifications based on sex, illegitimacy, or alienage. The Court's position with regard to each of these classifications will now be reviewed in greater detail.

A. *Sex Classifications*

The Supreme Court has determined that classifications based on sex "must serve important governmental objectives and must be substantially related to achievement of those objectives."[34] Furthermore, the governmental objectives of administrative ease and convenience are not themselves sufficient to sustain classifications which are based on archaic and overbroad generalizations and "gross, stereotyped distinctions between the sexes."[35] In fact, the Supreme Court has stated that under this standard, the state must show that a gender-neutral statute would be a less effective means of achieving the stated objective.[36]

During Rehnquist's tenure, the Court has invalidated sex classifications in nine out of the seventeen cases to reach the Court.[37] The list of sex-based laws which the Court has invalidated includes: an Oklahoma law which set the age for purchase of 3.2 beer at eighteen for females and twenty-one for males;[38] a provision of the social security laws which allowed a widower to receive survivors' benefits only if he was receiving one-half of his support from his wife;[39] an Alabama statute which required husbands, but not wives, to pay alimony;[40] a New York law that permitted an unwed mother, but not an unwed father, to block the adoption of a child by withholding consent;[41] and a provision of the Missouri workmen's compensation laws that denied a widower benefits from his wife's work-related death unless he proved dependence on her earnings, but granted a widow such benefits regardless of any dependence.[42]

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[33] Trimble v. Gordon, 430 U.S. 762, 777 (1977).

[34] Craig v. Boren, 429 U.S. 190, 197 (1977).

[35] Frontiero v. Richardson, 411 U.S. 677, 685 (1973).

[36] Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1980).

[37] Sex classifications were invalidated in the following cases: Kirchberg v. Feenstra, 450 U.S. 455 (1981); Wengeler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Caban v. Mohammed, 441 U.S. 380 (1979); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1977); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

[38] Craig v. Boren, 429 U.S. 190 (1976).

[39] Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

[40] Orr v. Orr, 440 U.S. 268 (1979).

Rehnquist has disagreed with the majority in seven of the nine cases in which the Court invalidated classifications based on sex.[43] His objections to the majority's decisions emanate from his theory of constitutional interpretation. Rehnquist argued in *The Living Constitution*[44] that the proper method of constitutional interpretation is to first look at the language of the document and then to the original intent of the framers. According to Rehnquist, the original legislative intent of the fourteenth amendment was to prohibit the states from treating blacks differently than whites. He argues that it is inappropriate for the Court to extend strict scrutiny of legislative classifications beyond the arena of racial discrimination. Therefore, while Rehnquist admits that racial classifications are presumptively invalid, he holds that, as to all other classifications, the principle of equal protection simply requires "that persons similarly situated should be treated similarly."[45]

Rehnquist also rejects the Court's intermediate standard of review as being too subjective. How is the Court to know what objectives are important, or whether a law is substantially related to the achievement of such an objective? Rehnquist argues that these phrases are so "diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives, or whether the relationship to those objectives is 'substantial' enough."[46] Questions concerning governmental objectives are appropriately left to elected officials; judges are simply not equipped with the data or the expertise to handle them. Since sex classifications do not warrant strict scrutiny and the intermediate standard of review is too subjective, the only standard which can be applied to test sex-based classifications under the Rehnquist approach is the rational basis test. He has argued that challenged sex classifications do not necessarily fail this minimum requirement.[47] Using language from opinions in which the Court has upheld economic regulations against equal protection challenges,[48] Rehnquist pays maximum deference to legislative decisions. If Rehnquist can discover any *conceivable* relationship, no matter how tenuous, between a classification and its stated purpose, he will vote to uphold the law. Thus, Rehnquist's standard of review clearly presupposes the result; it is an approach that renders the equal protection clause inconsequential when applied to sex-based classifications.

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[41] Caban v. Mohammed, 441 U.S. 380 (1979).

[42] Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1980).

[43] Rehnquist agreed with the majority in two cases. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), was a unanimous decision in which the Court invalidated a provision of the Social Security Act that allowed a widower to receive survivor's benefits only if he could show that he had been receiving one-half of his support from his wife. Rehnquist wrote a concurring opinion in which he argued that there was no rational basis for distinguishing between mothers and fathers when the interest of the child in receiving the full time attention of the remaining parent was at stake.

In Kirchberg v. Feenstra, 450 U.S. 455 (1981), the Court unanimously invalidated a Louisiana statute that gave a husband, as "head and master" of property jointly owned with his wife, the right to dispose of jointly held property without the wife's consent. Rehnquist joined Stewart's concurring opinion which emphasized that the decision did not apply to transactions executed before the lower court decision.

[44] *See supra* note 2.

[45] The "similarly situated" language comes from F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920): "[T]he classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id*. at 415.

In gender-based classification cases, Rehnquist has added a curious line of reasoning to his objections to the use of the intermediate standard of review. He has argued that even if the Court were to use heightened scrutiny when women are discriminated against, men should not be able to challenge legislation that disadvantages them.[49] This is because our American society has no tradition of discrimination against males, implying that women need special protection because of past discriminatory practices. However, Rehnquist would be quick to add that, while women may need special protection, such protection is not to be found in the equal protection clause.

When a majority of the Court has invalidated sex classifications, Rehnquist has contended, in dissent, that under the proper standard of review the challenged legislation would easily stand. Although the Court has generally remained unreceptive to Rehnquist's argument, it has, on two occasions, used the rational basis test to invalidate legislative classifications based on sex.[50] One such case involved a California statutory rape law which made men criminally liable for engaging in sexual intercourse with females under the age of eighteen. The California Supreme Court subjected the law to strict scrutiny and found the classification to be justified by the compelling state interest of preventing teenage pregnancies. When the United States Supreme Court decided the case, Rehnquist, speaking for four justices, used the rational basis test to uphold the law. In doing so, he made only a slight concession to the Court's customary use of the intermediate standard of review for sex classifications: "[T]he traditional minimum rationality test takes on a *somewhat* 'sharper focus' when gender-based classifications are challenged."[51] The purpose of the law, he found, was to discourage illicit sexual intercourse with minor females. There may have been a variety of reasons for the state to seek such a purpose, e.g., concern about teenage pregnancies, protecting young females from physical injury, and promoting various religious and moral attitudes towards pre-marital sex. The state has a strong interest in such a purpose because illegitimate pregnancies often result in abortions and additions to the welfare rolls. Because only women become pregnant, it was obvious to Rehnquist that men and women are not similarly situated with respect to the problems and the risks of sexual intercourse.

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[46] Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).

[47] *See*, e.g., Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976). Shapiro argued that Rehnquist's rational basis test requires only that a challenged classification not be entirely counterproductive with respect to the purposes of the legislation in which it is contained.

[48] For example, Rehnquist often quotes from McGowan v. Maryland, 366 U.S. 420 (1961), and F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

[49] Craig v. Boren, 429 U.S. 190, 218-221 (1976) (Rehnquist, J., dissenting).

[50] Michael M. v. Superior Court, 450 U.S. 464 (1981); Rostker v. Goldberg, 453 U.S. 57 (1981).

Rehnquist's use of the phrase "similarly situated" shifts the focus of analysis away from the question of whether a classification is substantially related to an important governmental objective. In effect, Rehnquist employs this phrase in order to slide the standard of review to one of minimum scrutiny. While an important question under the intermediate standard is whether a sex-neutral statute would be as effective as the one which was challenged, under Rehnquist's "similarly situated" approach this element of the inquiry merely asks whether a sex-neutral classification would substantially advance important governmental interests.[52] In the California statutory rape case, for example, he asserted that a sex-neutral statute would not only be unenforceable, but also that young females suffer sufficiently from the consequences of sexual intercourse and, therefore, may reasonably be excluded from legal punishment—a criminal sanction that falls solely on males serves to equalize its deterrent effect. Thus, the inquiry has been turned on its head in the sense that sex-neutral classifications must be defended and compared with the challenged classifications that are based on sex.

The statutory rape case was a five-to-four decision, but Rehnquist's opinion commanded only a four-person plurality, indicating that a majority will not subscribe to the implications of the "similarly situated" analysis. However, in a case dealing with sex discrimination implicit in a draft registration requirement,[53] Rehnquist again used the "similarly situated" language, and there were no concurring opinions in the six-to-three decision. The Military Selective Service Act, which authorized the President to require the registration of men, but not women, was challenged as a violation of the equal protection component of the due process clause. Rehnquist emphasized that, normally great weight must be given to decisions of Congress, but that in this case even greater deference should be accorded to the legislative branch because the case arose in the context of Congress' authority over national defense and military affairs where "the scope of Congress' constitutional power . . . [is] broad, [and] the lack of competence on the part of the courts is marked."[54]

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[51] Michael M. v. Superior Court, 450 U.S. 464, 468 (1981).

[52] Justice Brennan emphasized this point in his dissent. *Id.* at 488-89 (Brennan, J., dissenting).

Distinguishing previous cases in which the Court invalidated sex classifications, Rehnquist asserted that the decision to exempt women from registration was not an accidental by-product of traditional thinking about women. Indeed, Congress had good reason to exempt women: "[Congress] determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops."[55] Since women by law were not eligible for combat, it was reasonable for Congress to conclude that they would not be needed in the event of a draft and that there was no reason to register them. Rehnquist's conclusion regarding combat restrictions on women was based on the fact that men and women are not similarly situated for purposes of a draft or registration for a draft. Although such a statement appears to invoke the rational basis standard, Rehnquist expressly declined to apply a specific standard of review to the draft registration scheme. He justified his reticence by stating that "[a]nnounced degrees of 'deference' to legislative judgments, just as levels of 'scrutiny' which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result."[56]

The draft registration case was special in the sense that it involved national defense. Thus, the majority's agreement with Rehnquist's deferential approach to the draft registration scheme is not at all surprising. Still, it must be noted that Rehnquist's deference to Congress in this area is consistent with his deferential approach to the Social Security Act. Rehnquist has objected to challenges to the Social Security Act's provisions on grounds that special deference should be given to social insurance legislation since it has undergone so many changes over the years that a nice fit between a classification and the objective of the legislation is impossible and because administrative convenience is particularly important to the success of entitlement programs.[57]

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[53] Rostker v. Goldberg, 453 U.S. 57 (1981).

[54] *Id*. at 65.

[55] *Id*. at 76.

[56] *Id*. at 69. As Justices Marshall and White argued in their dissenting opinions, a substantial number of people in a conscripted military force would fill noncombat positions. Marshall contended that the exclusion of women from registration has no substantial relation to the government's interest in maintaining an effective defense. It was estimated that 80,000 people would have to be drafted for noncombat positions.

Rehnquist's opinions in the area of sex classifications are nothing if not consistent. His minimum scrutiny/maximum deference approach allows him to presume a rational basis for virtually any legislative scheme that treats men and women differently. Rehnquist's approach to sex classifications constitutes exactly what he purports to avoid: a set of "facile abstractions" used to justify a predetermined result—that of upholding the legislation against constitutional attack.

B. *Illegitimacy*

Legislative provisions that distinguish between illegitimate and legitimate children for purposes of inheritance,[58] the right to recovery for wrongful death,[59] welfare benefits,[60] and social security for surviving dependent children,[61] which have been challenged under the equal protection clause, have not been uniformly subjected to the intermediate standard of review. Although the level of scrutiny is less clear in the case of illegitimacy classifications than it is in sex classifications, the Court has invalidated illegitimacy classifications in five out of the ten cases that it has decided. Rehnquist dissented in each of the five cases.[62]

Rehnquist voices essentially the same objections to the majority's approach toward illegitimacy cases as he does to the Court's sex classification rulings. He argues that equal protection does not require that a states enactment be logical; rather, its only requirement is "that there be some conceivable set of facts that may justify the classification involved."[63] Rehnquist's dissent in *Trimble v. Gordon*[64] illustrates his approach in dealing with illegitimacy classifications as well as his general equal protection philosophy. The Court, in a five-to-four decision in *Trimble*, invalidated a provision in an Illinois law that allowed illegitimate children to inherit by intestate succession from their mothers only; yet legitimate children were allowed to inherit by intestate succession from both their fathers and mothers. Rehnquist complained that the Court's approach was confusing because it failed to specify the level of scrutiny employed. Additionally, he argued that the Court should not have focused its attention on the purpose of the law or the motive of the legislature in passing it. Because there will always be some imperfection in the fit between legislative motives and the means of accomplishing legislative goals, the Court, by examining such motives, has put itself in the position of deciding how much imperfection to allow and what alternative forms of legislation are available. The crux of the problem, according to Rehnquist, is that judges are no better equipped to make these assessments than are legislators. The result of this judicial "meddling" is that "we have created on the premises of the Equal Protection Clause a school for legislators, whereby opinions of this Court are written to instruct them in a better understanding of how to accomplish their ordinary legislative tasks."[65] In short, as far as Rehnquist is concerned, a standard of review which is more stringent than that of mere rationality necessarily results in the judicial interjection of the Court's values into the legislative democratic process.

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[57] Califano v. Goldfarb, 430 U.S. 199, 225 (1977) (Rehnquist, J., dissenting).

[58] Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977).

[59] Levy v. Louisiana, 391 U.S. 68 (1968).

[60] New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973).

[61] Matthew v. Lucas, 427 U.S. 495 (1976).

[62] The Court invalidated illegitimacy classifications in the following cases: Trimble v. Gordon, 430 U.S. 762 (1977); Jimenez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972).

C. *Alienage*

In 1971, the Supreme Court declared that "classifications based on alienage, like those based on . . . race, are inherently suspect and subject to close judicial scrutiny."[66] The Court, however, has not followed through on this pronouncement. When classifications based on alienage have been questioned, the Court's standard of review has been similarly undefined. Adding to this uncertainty is the fact that the Court employs a double standard with respect to federal and state alienage-based classifications: "[O]verriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a state."[67] However, there are two reasons that classifications based on alienage present a somewhat different problem from those based on sex and illegitimacy. First, the concept of citizenship itself implies the existence of favored status for members of a specified group: alienage may be a relevant classification where illegitimacy and sex are not. Second, unlike illegitimacy or gender, alienage is not an irrevocable personal trait; an alien can eventually change his status by following specific procedures to obtain United States citizenship.

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[63] Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 183 (1972).

[64] 439 U.S. 762 (1977).

[65] *Id.* at 784.

[66] Graham v. Richardson, 403 U.S. 365, 372 (1971).

[67] Hampton v. Mow Sun Wong, 426 U.S. 88, 101 (1976).

In 1973, the Supreme Court employed maximum scrutiny to invalidate a Connecticut statute that excluded resident aliens from law practice[68] and a New York law that excluded noncitizens from holding permanent positions in the competitive, classified civil service.[69] In a dissenting opinion which responded to both cases, Rehnquist emphasized the importance of the concept of citizenship. The Constitution, he argued, makes a distinction between citizens and aliens eleven times: "Citizenship [is symbolic of] a status in the relationship with a society which is continuing and more basic than mere presence or residence."[70] He asserted that the Court, without any constitutional basis, was arbitrarily awarding special protection to particular groups of people. He emphasized that aliens can change their status and become American citizens. In Justice Rehnquist's opinion, it is not unreasonable to require aliens to demonstrate an understanding of the American political and social structure and a dedication to American values by going through the naturalization process.[71]

Where classifications based on alienage are embedded in statutes controlling employment, the Court uniformally defers to the legislative wisdom of the state. For example, the Court, in 1978 and 1979, upheld certain state laws which barred aliens from employment as state troopers[72] and listed citizenship as a requirement for the certification of public school teachers.[73] In 1982, the Court upheld a California statute that made citizenship a prerequisite to employment in any state, county, or local governmental position which bestows upon the employee the powers of a peace officer.[74]

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[68] In re Griffiths, 413 U.S. 717 (1973).

[69] Sugarman v. Dougall, 413 U.S. 634 (1973).

[70] *Id.* at 652.

[71] In Examining Bd. of Eng'rs., Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976), the majority, applying strict scrutiny, invalidated a Puerto Rico statute that permitted only United States citizens to practice as civil engineers. Rehnquist, dissenting in part, argued that the equal protection clause of the fourteenth amendment did not apply because Puerto Rico is not a state, and the equal protection component of the due process clause of the fifth amendment did not apply because the law in question was not enacted by Congress, but by the Puerto Rico legislature, instead.

[72] Foley v. Connelie, 435 U.S. 291 (1978).

[73] Ambach v. Norwick, 441 U.S. 68 (1979).

[74] Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

Finally, in a 1973 case, the Court stated the exception to the rule of strict scrutiny of legislation involving alienage classifications: "[S]crutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives."[75] The subsequent cases suggest that the exception has devoured the rule, and that, at least in the area of classifications based on alienage, it appears that Rehnquist's position now commands a majority.

Rehnquist's equal protection opinions involving classifications based on sex, legitimacy, and alienage clearly conform to his professed judicial philosophy. His insistence that the Court apply strict scrutiny only where racial classifications are involved is consistent with his positivistic approach to constitutional interpretation, i.e., that interpretation of the fourteenth amendment should adhere to the original intention of the framers of the Constitution. Rehnquist is undaunted by the problems that accompany such an approach. Additionally, his opinions are consistent with his view of the American constitutional system as a democracy in which the function of judicial review is simply to prevent the popularly elected branches from transgressing the limits of their authority, rather than one to solve substantive problems. Rehnquist's adamant objection to the judiciary's taking an active role in invalidating legislation that results from the political process is consistent with his emphasis on the democratic nature of the Constitution. Finally, Rehnquist's opinions are consistent with his assertion that policy should be made by the majority rather than imposed by a minority from outside the political arena. His reliance on majority rule is ultimately relativistic in the sense that policy made through proper procedures may discriminate against certain, nonracial, groups without violating the equal protection clause. Discrimination, per se, is not prohibited; conversely, equality is not an authoritative value. The equal protection clause, in Rehnquist's opinion, is clearly not a substantive guarantee of equality.

V. RACIAL EQUALITY: REHNQUIST'S OBSTACLE COURSE

One immediate purpose of the fourteenth amendment was to prevent states from passing legislation which treated blacks differently from whites. Classifications based on race are presumptively invalid. Therefore, cases involving racial classifications are relatively easy to decide. The determining factor for Rehnquist in these "relatively easy" decisions is the presence of purposeful discrimination through legislation or other official policy. In the absence of purposeful discrimination, there is no equal protection violation. Rehnquist has, in effect, erected obstacles to the utilization of the equal protection clause even when racial classifications are involved. His approach to the state action requirement and his approach to the closely related *de jure/de facto* distinction illustrates the limited nature of Rehnquist's interpretation of the equal protection clause.

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[75] Sugarman v. Dougall, 413 U.S. 634, 648 (1973).

A. *Significant State Involvement in Racial Discrimination: A New State Action Formula*

While the Supreme Court has consistently held that government involvement in racial discrimination is a prerequisite for invoking the protections of the fourteenth amendment, members of the Supreme Court have disagreed on the degree of involvement which is required. In *Moose Lodge No. 107 v. Irvis*,[76] a case involving a liquor licensing scheme of a private club which refused to admit blacks to its restaurant and cocktail lounge, Rehnquist, for the majority, expressed his view that the required degree of state action was absent. The state liquor license, he held, did not sufficiently implicate the state in the racial discrimination practiced by the club. He argued that the presence of "any sort of benefit or service at all from the state," or any state regulation, does not itself amount to significant state involvement.[77] He also distinguished an earlier case, *Burton v. Wilmington Parking Authority*,[78] in which the Supreme Court found that a restaurant that leased its space from a state agency, and was located within a building owned and operated by that agency, had a sufficiently close relationship with the state to come under the restrictions of the fourteenth amendment. In *Burton*, there was such a close relationship between the restaurant and the state that the latter was deemed a participant in the discriminatory activity. In contrast, the private club, as Rehnquist pointed out, was located on private land and was not open to the public—it was a private social club in a private building. The liquor license did not sufficiently implicate the state in racial discrimination despite the fact that the state arguably involved itself extensively in the operations of the business by virtue of its issuing a liquor license. *Burton* emphasized the impossibility of stating a precise formula for determining when government involvement is sufficient to call into question the equal protection clause.[79] Rehnquist, however, appeared to reject this flexible approach in favor of the more stringent requirement that the state must directly and specifically "foster or encourage racial discrimination" before any equal protection claim can arise.[80]

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[76] 407 U.S. 163 (1972).

[77] *Id*. at 173.

[78] 365 U.S. 715 (1961).

[79] *Id*. at 722.

A more demanding state action requirement would make it more difficult for members of minority groups to challenge racially discriminatory practices which would indirectly result from state action. Rehnquist's approach to state action implies that state regulation of business or industry will not be sufficient to invoke the provisions of the fourteenth amendment when "private" entities directly engage in racially discriminatory practices.[81] Whatever its result, his approach to the state action requirement is predictible given his positivistic interpretation of the fourteenth amendment. A high level of government involvement must be present before action may be properly considered action of the state for fourteenth amendment purposes.

B. *School Desegregation: The* De Jure/De Facto *Distinction*

In 1968, exasperated by the slow pace at which school desegregation was occurring, in spite of the Court's mandate to use "all deliberate speed,"[82] the Supreme Court charged public school boards, which had operated dual school systems pursuant to state laws existing in 1954, with an affirmative duty to eliminate racial discrimination.[83] Thus, southern school systems that had practiced *de jure* segregation in 1954, and remained segregated, were clearly under an obligation to eliminate their dual systems. The legal status of segregated schools in northern cities, where proof of ongoing purposeful discrimination was made difficult by the fact that such segregation was not explicitly sanctioned by law, was unclear. Were such school systems obligated to desegregate?

Under the Supreme Court's early rulings in cases involving southern schools,[84] it was anticipated that northern school systems would not come under the Court's desegregation mandate; theoretically, since segregation of northern schools was not supported by state action, it must be considered to be *de facto*, as opposed to *de jure*, discrimination. Thus, such segregation would be considered to be beyond that ambit of the equal protection clause. A majority of the Court, however, has taken an approach to northern school desegregation cases which renders the *de jure/de facto* distinction less clear than the earlier southern cases indicated.

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[80] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972).

[81] Rehnquist authored two other opinions involving the state action question, but the cases did not involve racial discrimination or equal protection. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[82] Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

[83] Green v. County School Bd., 391 U.S 430 (1968).

[84] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S 430 (1968).

The northern school desegregation issue was first presented to the United States Supreme Court a year after Justice Rehnquist took his position on the bench. Since that time, he has persistently objected to the way the majority has treated the issue of northern desegregation.[85] In 1973, Rehnquist lodged the sole dissent to the majority's holding that a district-wide desegregation plan in Denver was justified on a finding of intentional discrimination in only one part of the district.[86] Rehnquist emphasized the factual differences between the segregation that existed in the Denver schools from that which existed in the southern school systems. More basically, he objected to the Court's imposition in 1968 of the "affirmative duty" to desegregate, characterizing it as an unexplained extension of *Brown v. Board of Education*. While Rehnquist conceded that such a duty exists, he maintained that it should be applied only to southern school systems where segregation had once been mandated by law.

Rehnquist viewed the Court's reasoning in two northern school desegregation cases decided in 1979[87] as a further unwarranted departure from the *de jure/de facto* distinction. In both of these cases, the majority held that school boards which intentionally maintained dual school systems in 1954, and which continued to maintain them, must show why they have not taken necessary steps to desegregate. These school boards bear the heavy burden of showing that their actions, promoting the dual school systems, serve important and legitimate ends. In *Columbus Bd. of Educ. v. Penick*, the Court stated that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose."[88] The Court still requires a finding of *de jure* segregation as shown by the school boards' (or administrators') purposeful segregative action in order to justify a legally imposed remedy for racially imbalanced schools. The 1979 cases, however, facilitate findings of purposeful segregation by their reliance on proof of intentional segregation in 1954, as well as on the "foreseeable and anticipated disparate impact" of school authorities' actions.

Rehnquist is adamantly opposed to what he refers to as the Court's "new methodology." First, he argues that there is no reason to look at a school's actions before 1954, unless the school has a history of legally mandated racial segregation. Presumably, this means that schools which were not *legally* segregated in 1954, should not be made to bear the responsibility of achieving a unitary system. Second, he argues that the burden of showing a discriminatory purpose should lie with the plaintiffs, and when there is no evidence to prove or disprove the justification offered by a school board for its actions, the Court should not hold that there is a violation of a constitutional right. Rehnquist's approach to desegregation is clear. In order to justify the imposition of a remedy for racially imbalanced schools, the lower courts must find some action on the part of the school board which intentionally discriminated against minority students. If such violations are found, the Court must then determine how great a segregative impact the violations have on the racial distribution of the schools. The remedy must only redress the difference; if past violations are found to have occurred, the proper remedy "is to restore those integrated educational opportunities that would now exist but for purposefully discriminatory school board conduct."[89] In short, Rehnquist's approach would make it considerably more difficult to challenge racially segregated schools. Rehnquist's approach would also limit the remedy to the correction of the actual violation.

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[85] *Contra* Milliken v. Bradley, 418 U.S. 717 (1974).

[86] Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

[87] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*).

[88] 443 U.S. 449, 464 (1979).

Rehnquist has never voted to uphold a school desegregation plan.[90] In light of recent congressional overtures aimed at preventing the judiciary from expanding its policy of desegregation, it might be prudent for the Court to keep a low profile in this area. Should Congress actually attempt to limit the judiciary's remedial powers with regard to desegregation, Rehnquist could be expected to side with Congress. Indeed, Rehnquist might take advantage of such an opportunity and attempt to overturn many of the important school desegregation rulings handed down by the Supreme Court. Although Rehnquist surely would not go so far as to repudiate *Brown*,[91] he would interpret it narrowly as applying only to le-

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[89] *Id.* at 524.

[90] In United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972), a unanimous decisions which involved a state law which created a new school district in Halifax County, North Carolina, the Court held that if the new school district hindered the dismantling of the dual system, the implementation of the legislation could be enjoined.

[91] *But see* R. KLUGER, SIMPLE JUSTICE 606-11 (1975). As a law clerk, Rehnquist prepared a memo for Justice Robert Jackson to be used by Jackson in developing his arguments for conference on the *Brown* case. Rehnquist's memo, entitled "A Random Thought on the Segregation Cases," contained the following passage:

> One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed

gally authorized or mandated segregated schools, and would gladly repudiate its successors, which, in his view, have rendered the *de jure/de facto* distinction meaningless.

VI. REHNQUIST ASCENDANT? A VOTING ANALYSIS

Is Justice Rehnquist's influence among the other members of the Supreme Court increasing? Is his version of the equal protection clause likely to gain majority support? Are we likely to see him authoring more majority opinions upholding sex-, illegitimacy-, and alienage-based classifications, and invalidating school desegregation plans? After examining Rehnquist's judicial opinions in 1975, John R. Rydell concluded that Rehnquist's approach to equal protection was not likely to become the dominant view of the present Court.[92] Other contemporary observers of Rehnquist's behavior on the Court have asserted that he is the source of vision that currently informs the work of the Supreme Court. In 1982, Owen Fiss and Charles Krauthammer asserted that Rehnquist is emerging as the leader of a conservative bloc consisting of Burger, Powell, White, and O'Connor, and that his influence is likely to expand given his relative youth and the likely pattern of future appointments.[93] Thus, the early image of Rehnquist standing alone in "right field" may soon fade as he rises to prominence in the conservative Court of the 1980's.

While Rehnquist has been in the minority in many of the equal protection cases, he has also been a most vocal dissenter,[94] and he has also spoken for the majority in several important decisions. Thus, a reading of the Court's equal protection opinions seems to indicate that Rehnquist might be an emerging leader on the Court. To test this impression, this section provides an analysis of the votes in all of the equal protection cases which Rehnquist participated in through 1981.[95] Using data from eighty-eight cases, majority percentages and dissent rates for each justice, and interagreement scores for all pairs of justices, were computed in

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> off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying on the sentiments of a transient majority of nine men.
>
> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. . . .

[92] Rydell, *supra* note 1, at 875.

[93] Fiss & Krauthammer, *The Rehnquist Court*, THE NEW REPUBLIC, Mar. 10, 1982, at 14-21.

[94] Rehnquist filed an opinion in twenty-four of the twenty-eight cases in which he dissented.

[95] All non-unanimous equal protection cases decided in full, as well as *per curiam* decisions that elicited dissenting opinions, have been included in the analysis. A complete list of cases is available upon request from the author.

order to determine whether Rehnquist's interpretation of the equal protection clause is likely to be shared by a majority of the Supreme Court.

A. *Majority-Dissent Percentages*

As Table 1 indicates, Rehnquist voted with the majority in 67.8 percent of the non-unanimous cases in which he participated. This majority participation score indicates that five of the other Justices voted with the majority a higher percentage of the time than he did.[96] He dissented twenty-eight times; in eleven of those cases he dissented alone. Also, he filed an opinion in all but four of the twenty-eight cases.

TABLE 1
Dissents and Majority Participation (Non-unanimous Equal Protection cases 1972-1981)

Justice	Number of Cases	Majority Participation		Dissents	
		N	PCT	N	PCT
Powell	87	79	90.8	8	9.1
Blackman	88	76	86.4	12	13.6
Stewart	88	74	84.1	14	15.9
Burger	88	74	84.1	14	15.9
White	87	68	78.2	19	21.8
Rehnquist	87	59	67.8	28	32.2
Stevens	49	32	65.3	17	34.7
Brennan	88	39	44.3	49	55.7
Douglas	37	15	40.5	22	59.5
Marshall	87	34	39.1	53	60.9

A gross analysis of dissenting and majority participation rates is misleading because of the relatively large number of equal protection cases that involved challenges to economic legislation. In these cases, the Court used the rational basis test to uphold the law, and Rehnquist voted with the majority. If, however, the cases are divided into seven categories based on the type of classification which was challenged,[97] a clear pattern does emerge.[98] Rehnquist, in terms of majority participation, ranks sixth in race cases, eighth in gender cases, last in both alienage and illegitimacy cases, and fourth in economic regulation cases.

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[96] *See* Heck, *Civil Liberties Patterns in the Burger Court, 1975-78*, 34 W. POL. Q. 193 (1981).

[97] The seven case types of challenged classifications are: race, gender, illegitimacy, alienage, voting, poverty, and other.

[98] However the number of cases is far too small to provide statistical reliability of the findings.

B. Bloc and Time Series Analysis

The majority participation percentage permits a general assessment of Rehnquist's position in relation to the other members of the Court; this does not indicate, however, that the majority subscribes to his interpretation of the equal protection clause. The question of whether other members of the Court may be moving closer to Rehnquist's views remains; neither a "bloc" analysis, nor a "time series" analysis, currently supports an affirmative reply.

TABLE 2
Matrix of Interagreement: Non-unanimous Equal Protection Cases 1972-1981

MRSH	BRN	DOUG	STVN	WHTE	STEW	BLKM	POW	BURG	REHN
—	95.3	89.2	54.2	55.9	36.7	36.7	32.6	24.1	5.9
	—	86.5	61.3	60.8	39.8	42.0	36.8	28.2	11.4
		—	—	44.4	51.3	35.1	38.9	32.2	5.4
			—	53.1	57.2	57.1	70.1	46.9	43.8
				—	62.0	71.2	68.6	64.3	48.9
					—	75.0	81.5	81.8	70.1
						—	89.1	81.7	67.8
							—	86.2	72.1
								—	81.5
									—

Court cohesion = 55
Sprague criterion = 78

In the bloc analysis, the interagreement percentages indicate that "Rehnquist's bloc" consists of no more than two justices. There appear to be two blocs at opposite ends of the spectrum: Brennan and Marshall received a score of 95.3 percent on interagreement, and Burger and Rehnquist scored 81.5 percent on interagreement. The interagreement scores for Powell, Blackman, and Burger are all sufficiently high for them to be characterized as a bloc, with Rehnquist being a marginal member (at best). Thus, the "Rehnquist bloc" consists of only Rehnquist and Burger.

The time series analysis is even less useful on the important question of whether Rehnquist's influence has increased with his tenure on the Court. A comparison of Rehnquist's majority and dissenting votes by year is outlined in Table 3.

TABLE 3
Rehnquist's Majority/Dissent Votes 1972-1981

Court Term	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980
Majority Vote	3	8	9	3	7	8	3	10	2	5
Dissenting	2	7	3	1	2	5	1	4	3	0
Total	5	15	12	4	9	13	4	14	5	5
Percentage Majority	60	53.5	75	75	77.7	61.5	75	71.4	40	100

Although the collection of cases used was too small to provide statistically reliable results, no pattern of emerging leadership is discernible.

VII. CONCLUSION

In Rehnquist's view, the fourteenth amendment was not intended to be an affirmative guarantee of equality. Its purpose was simply to prohibit the states from treating blacks and whites differently under the law. Such a view is consistent with his belief in immanent positivism, requiring adherence to the text of the Constitution and reliance on the original intention of the framers of the Constitution—even if their intent is not discernable. Rehnquist consistently argues that the rational basis test is the proper standard of review where racial discrimination is not implicated. Even when race is involved, Rehnquist is very reluctant to use the equal protection clause unless he finds discrimination that is both purposeful and officially sanctioned. His approach to equal protection analysis flows from his view of the limited role of the judiciary in the American political system. Rehnquist believes the Supreme Court should pay maximum deference to the decisions of popularly elected officials. The states, in particular, should be given maximum leeway to determine the best solution to their problems. Rehnquist's faith in the ultimate fairness of majoritarianism seems to be the key to his emphasis on state autonomy and to his minimum scrutiny/maximum deference approach to equal protection.

The analysis of voting data does not support the thesis that Rehnquist's influence among the other members of the Court is increasing. However, the number of cases utilized in the analysis was clearly inadequate for the task of indicating patterns of change over time. Another variable which adversely affects the reliability of the analysis of the voting data is the fact that there is a new justice on the Court, and it is too soon to analyze her voting behavior. In the next few years, it will be important to observe whether Justice O'Connor will align herself with the Rehnquist/Burger bloc. Looking toward the future, it is clear that if two new Justices are appointed by a conservative republican President, the balance of power could shift in Rehnquist's favor.

The possibility of a Supreme Court majority subscribing to Rehnquist's interpretation of the equal protection clause has serious implications. Despite Justice Stone's footnote in the 1938 case of *Carolene Products*, which suggested that the fourteenth amendment might give special protection to members of groups which have been traditionally disfavored and excluded from the political process,[99] the Supreme Court did not actually begin to give serious meaning to the equal protection clause until 1954. Since then, however, the Court has led the American political system—first in the quest for racial equality, and then in efforts to achieve equality for women and other traditionally powerless groups. By its willingness to take an active role in interpreting the equal protection clause, the Court has undertaken the responsibility of shaping and defining an evolving concept of equality. If a majority of the justices were to accept Rehnquist's view of equal protection, the Court would no longer perform such a role. Members of "discrete and insular" minorities, who have turned to the judicial system because relief was not available from the democratic process, would find the courts unresponsive as well. The result of a Rehnquist-led majority would be an equal protection clause that offers little protection to racial minorities; virtually no protection to women, aliens and illegitimates; and no "special" preferential treatment to members of traditionally disadvantaged groups. Members of such groups would have no legal recourse if the political process did not offer them an opportunity to challenge discriminatory policy. On a more general level, Rehnquist's relativistic version of the equal protection clause would render equality a value that would forever remain merely personal, and without intrinsic moral worth, since the goal of equality can never be enacted into law through a democratic process.

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[99] United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

TESTIMONY OF

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UNIVERSITY OF CHICAGO

before the

COMMITTEE ON THE

JUDICIARY

U.S. SENATE

HEARINGS ON THE NOMINATION OF
JUSTICE WILLIAM REHNQUIST
AS CHIEF JUSTICE OF THE
UNITED STATES

JULY 31, 1986

Congress has few responsibilities so heavy as that of selecting the leader for a coordinate branch of government, the sixteenth Chief Justice of the United States. This is not an appointment to a President's administration. The influence of this appointment on our history and our society goes much deeper and will likely last long after the names of the present Cabinet are forgotten and most of the members of the present Senate are no longer here. Senators should reach their own independent judgment on this appointment and should not feel bound by short-term notions of political advantage or loyalty. Supreme Court nominees have been rejected far more frequently than any other presidential nominations because of their great importance and enduring consequences. Of the eight nominations sent to the Senate between 1967 and 1971, for instance, only half were confirmed and Senate action was blocked on President Johnson's nominee for Chief Justice. Several other nominations have not been submitted because of fear of defeats. The Senate has a special responsibility in these nominations and it has been a responsibility Senators have been willing to exercize when basic issues have been at stake.

I urge the Senate to reject the nomination of Justice William Rehnquist as Chief Justice. I do this because I believe that Justice Rehnquist's long and unchanging record of hostility to governmental protection of minority rights renders him unworthy to hold the position of preeminent leadership in the American system of justice. I believe that the appointment is an insult to minorities and women in the U.S., that it is part of a concerted strategy of the Reagan Administration to weaken federal protection of civil rights, and that it will endanger the capacity of our political system to cope with very severe problems of inequality in an increasingly multi-racial society and a society where the role of women is becoming ever more important. No modern Justice has been so consistently hostile to enforcement of equal protection of the laws or has embraced so consistently a fundamentalist legal philosophy that so firmly denies any possibility of judicial protection for victims of discrimination.

This testimony will first briefly discuss the nature of the Senate's responsibility in nominations to the Supreme Court. Second, it will describe the role of the courts in protecting minority and women's rights and the critical battles against civil rights enforcement by all branches of government now being waged by the Reagan Administration. Third, it will discuss the wishful thinking about Mr. Rehnquist and misleading testimony by Mr. Rehnquist/ that contributed to his initial confirmation for the Court. Fourth, it will show through statistics and through quotes from his writings and decisions the nature and intensity of his opposition to minority rights during his service on the Court. This account will show that the opposition is fundamental, will quote from his angry and beligerent attacks on other justices when his position fails, and will show that the hostility to minority rights has not abated with his years of service on the court. Fifth, I will suggest that the appointment of an ideological extremist is likely to either deepen polarization on the court or lead the court into a situation in which it can offer nothing but frustration to a severely divided society where governmental power is increasingly being used to deepen rather than remedy inequalities.

The Role of the Senate. Each time the Senate has faced a controversial Supreme Court nominee in the last twenty years there has been a review of the history of conflicts over appointments and Senate rejections of nominees. In the last century the resistance to Presidents even went to the extreme of changing the size of the Court. In this century nominees and possible nominees have been sharply questioned about their personal and legal background and their orientations toward civil rights, rights of the accused, abortion, and other matters. In a society where the Supreme Court makes the final decision about the contemporary meaning of such sweeping and unspecific constitutional provisions as "due process of law" and in a court where many decisions of great importance for the nation are made by 5-4 votes, it is an insult to the intelligence of the public to suggest that one need only consider a nominees grades in law school. It is perfectly appropriate for the Senate to determine whether or not a nominee has a closed mind to the claims of millions of Americans in minority groups who rarely win legislative battles and rely on the courts for the protection of their basic rights. I do not believe that the Senate should name as leader of our highest court a nominee whose positions are consistently hostile, often even when other conservative justices recognize the need for some kind of response.

When I testified against Mr. Rehnquist's initial appointment fifteen years ago I had to opportunity to discuss both the issues and the responsibility of Senators with a number of Senators and staff members. Three basic questions were on their minds. The first was whether or not Senators owed deference to the President in making the decision. The second was whether or not they should consider anything beyond the intellectual competence of the appointee, and the third was whether or not it was possible to know in advance how a member of the Supreme Court would vote once he was given life tenure and was responsible only to history. A reading of the floor debate shows that these issues remained very much in the forefront as Senators reached their decisions.

Since there has been no seriously contested nomination for the last fifteen years and since Mr. Rehnquist has already outlasted 78 of the 100 Senators in office in 1971 it is important to review those questions and to find out what evidence can be drawn both from the historic record and from Mr. Rehnquist's actual performance as a Justice.

The courts have always played an extraordinary role in our litigious and legalistic society where power is distributed in extremely complex ways, where legislative bodies are dominanted by lawyers, where bureaucratic regulations draw heavily on legal precedents, and where the courts have the final power to declare what the laws and the Constitution mean. Nothing is more traditional in American politics than that there should be a struggle over Supreme Court appointments, particularly when there are basic legal issues unsettled in the nation and when a President is perceived as trying to extend his partisan views to constrain the next political generation through control of the Supreme Court.

George Washington, perhaps the most universally revered President, and James Madison, the dominant intellect of the Constitutional Convention, lost appointments on political grounds. Washington's appointment of John Rutledge to be the nation's second Chief Justice was defeated in 1795. Jefferson was bitterly critical of the Supreme Court. Andrew Jackson confronted harsh battles over nominees. Because of their worry over the racial policies of President Andrew Johnson the Republicans who controlled Congress during Reconstruction succeeded in shrinking the Court to eliminate the possibility of more appointments by a hostile President. President U.S. Grant was forced to withdraw two nominations for Chief Justice from the Senate. There have been a number of other defeats, either through negative votes by the Senate, refusal to act on nominees, withdrawal of nominations, or decisions by Presidents that it would be futile to submit the nominees they preferred because of inevitable controversy and possible defeat.

During the last twenty years the Senate refused to act on President Johnson's nomination of Justice Fortas as Chief Justice and Judge Throneberry as Associate Justice. Two of President Nixon's nominees were defeated by votes in the Senate, several more candidates approved by the President were never submitted to the Senate because of strong public criticism, and another, Justice Rehnquist received 26 negative votes. In all of these disputes, as well as in the Senate action rejecting President Hoover's nomination of Judge Parker, ideological issues were very important, although there were often other issues as well.

It is particularly instructive to review the record of the Senate in blocking the nomination of President Johnson's choice as chief justice. Although Justice Fortas later resigned on another issue, the battle in 1968 was partisan and ideological. Leader of the Senate opposition, Sen. Robert Griffin (R-Mich.) and vice presidential nominee Spiro Agnew said that a lameduck president should not be allowed to appoint a Chief Justice whose judgments would so strongly shape the legal future. Sen. Howard Baker (R-Tenn.), future Senate Majority Leader, said that he had "no question concerning the legal capability of Justice Fortas" but that he would oppose him anyway. In a July 1, 1968 speech Sen. Strom Thurmond (R-S.C.) announced his opposition to Fortas on philosophic grounds and claimed that the appointment was a plot between Chief Justice Warren and President Johnson "because they both want to continue the policies of Chief Justice Warren."

The Republicans were so determined to stop the confirmation that they used a filibuster to prevent a majority vote on the nomination. It was the first time in the history of the Senate that a filibuster had been used to block a presidential nomination. Analysis of the vote on cloture, the vote that led to the President's withdrawal of the nomination, shows that the Senators voted on ideological and partisan grounds. Three-fourths of Republicans and nine-tenths of Southern Democrats voted against cutting off debate while nine-tenths of Northern and Western Democrats voted for cloture. Some of the same Senators who now take the position that there should be quick confirmation of Justice Rehnquist with no searching examination of the consequences of his decisions for the rights of millions of Americans were then quite willing to support a minority veto through the filibuster system to prevent President Johnson from making an appointment they disagreed with. Their success made possible the Burger Court. Chief Justice Burger's unusual decision to resign his office while still in good health now gives President Reagan the possibility of nominating a candidate who may carry the ideals of the Reagan Administration into the next century as the leader of the judicial branch of government. The Senate has both the right and the obligation to determine what this may mean for our common future.

The Civil Rights Situation. My testimony against Justice Rehnquist focuses on his record in the enforcement of the Constitution's guarantee of "equal protection of the laws."

When considering his decisions on minority rights and sex discrimination, however, it is very important to keep in mind the larger context within which the decision about the future of the Supreme Court takes place.

We are in an Administration with a record of hostility to minority interests unmatched in more than a half century. The President ran on an anti-civil rights platform, pledging to change the Constitution and redirect the courts. He received virtually no black support in either campaign and only a small minority of Hispanic votes. He has appointed to key civil rights enforcement offices active opponents of civil rights laws who often use their offices to fight black, Hispanic and women's organizations in the courts and in administrative regulation decisions. The recent extraordinary action of House liberals and moderates in voting to abolish the U.S. Civil Rights Commission, which was put in the hands of strong opponents of civil rights after a quarter century of important bipartisan service is one sign of the current situation. We are in a situation where the Attorney General bitterly attacks the Supreme Court and where his assistants appeal to federal courts to end school desegregation and affirmative action plans.

It is no accident that the President has chosen the Justice who is the most opposed to civil rights litigation. Only the courts have blocked the Reagan efforts to resegregate schools, end affirmative action, and deny governmental responsibility for housing policies that produced segregation and unequal opportunities. Rehnquist is the Justice most closely in agreement with the Administration's policies, even in the case in which they fought to restore tax subsidies to segregated private education. This appointment is an important part of the effort to reverse the momentum of civil rights.

American society and the American economy are changing rapidly in ways that produce new challenges for all institutions of government. The minority fraction of U.S. population is increasing rapidly and it is clear that the next generation will be by far the most profoundly multiracial in American history. A second very large minority group has emerged, the Hispanics, whose numbers might well exceed those of blacks not far into the next century. The great majority of the new jobs in the society are occupied by women and a rapidly increasing share of children are growing up in households headed by women. Occupational segregation and wage inequality, however, remain very severe. In the 1980's there are many signs of decreasing educational opportunity for black and Hispanic youth even as the economic changes eliminate employment opportunities for those without income. High school dropout rates are rising and the share of minorities going to college declining. Residential segregation has remained almost untouched by extremely weak fair housing policies and new jobs are being concentrated in outlying suburban areas not accessible by workers from segregated inner city communities. Inner city schools and other institutions have to rely on a constantly shrinking share of metropolitan tax resources to deal with an increasingly impoverished and miseducated enrollment.

No one, of course, thinks that the courts can or should solve all of these problems but they do set the context within which issues are formulated.

One of the basic problems faced by minorities and women is their relative powerlessness. They have few representatives within government and at the top levels of private organizations. More seriously,they face a political environment where the representatives of the status quo generally command most of the resources and where politicians often have more to gain from creating fears of change than from responding to minorities. This is particularly true on matters of race relations where anti-change politicians can often exploit racial fears and prejudices of the majority.

These general problems are compounded by the system of minority veto that is so deeply institutionized in Congress. The Senate filibuster system blocked anti-lynching legislation for almost a half-century, killed a fair housing enforcement bill in 1980, blocked the Grove City legislation, and, in general, makes it virtually impossible to enact any serious civil rights measure apart from voting rights except when there is an extraordinary majority of the kind last seen almost two decades ago.

The Courts become particularly critical to minority groups during periods when political leadership is hostile to their interests. It is understandable, for instance, that women's groups, whose drive for the Equal Rights Amendment was defeated by a conservative movement that assured women that the Supreme Court would attend to discrimination without the ERA are deeply concerned when a hostile Administration attempts to name a Chief Justice who has clearly and repeatedly said that he believes there is nothing in the Constitution that forbids unequal treatment by sex. It is understandable that civil rights groups fighting a Justice Department committed to resegregating integrated school districts does not want to have a Chief Justice with the same attitude.

We are in a period when enforcement of existing civil rights laws has virtually ceased in many areas, when the relative status of minority and female-headed families has deteriorated, when there have been sharp reductions in provision of such basic essentials as welfare payments for poor children, housing, health care, job training, and others. Existing political leadership attacks both the tools to deal with discrimination directly and the programs to help overcome the effects of past discrimination.

Serious litigators for equal rights rarely go to court because they think that the courts will provide speedy and comprehensive remedies. The courts are slow, cautious and usually incremental in their decisions. Civil rights plaintiffs often lose. They go to court because they believe they have rights and there is nowhere else to go.

They believe that it is inherent in the Constitution that minority rights must be protected by the courts regardless of what the popular majority of the moment may wish to do to minorities. If that is not true, the rights are nothing more than empty promises that the majority may chose to dishonor whenever it wishes. In many of Justice Rehnquist's decisions, however, there is no understanding of the fact that minorities often have no real political alternative and that it is precisely under those circumstances that their legal rights become most important and the role of the courts in protecting them most critical.

The Promise of Fairness. When his nomination to the Supreme Court was pending before the Senate, Mr. Rehnquist and his supporters argued that neither his active opposition to civil rights as a private citizen and a Supreme Court clerk nor his work in the Nixon Justice Department should be taken as reflections of his personal attitudes toward civil rights and civil liberties. Descriptions of his early actions were dismissed as inaccurate or no longer relevant. His statements as a Justice Department official were dismissed as "advocacy," not a statement of personal beliefs. Supporters pointed to the surprising evolution of some earlier Justices after their appointments. Rehnquist fed such hopes with statements that he would divorce his personal political attitudes from his role as a Justice. Moderates in the Senate were encouraged to hope that the rigid ideological conservative would metamorphize into a judge who would look at cases with dispassion and come to terms with the profoundly difficult problems of equal rights in a society of deep and persisting inequality.

The American Bar Association report supporting the nomination explained the civil rights and civil liberties statements as "professional advocacy" or statements of legal "philosophy." Arizona State Senator Sandra Day O'Connor, later to join her law school classmate on the Court, commented: "When Bill has expressed concern about any law or ordinance in the area of civil rights, it has been to express a concern for the preservation of individual liberties of which he is a staunch defender in the tradition of the late Justice Black."

Mr. Rehnquist, in explaining the way he would respond to his responsibilities on the court, invoked another great jurist, Justice Frankfurter and repeatedly promised to separate his personal politics from his decisions as much as possible:

> I have always felt that, as I think Justice Frankfurter said, you inevitably take yourself and your background with you to the Court. There is no way you can avoid it, but I think it was Frankfurter who also said, if putting on the robe does not change a man, there is something wrong with that man. I subscribe unreservedly to that philosophy that when you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. (Hearings, 156)

The majority report of the Judiciary Committee, recommending that the Senate confirm Mr. Rehnquist as an Associate Justice dismissed many of his statements as vigorous advocacy, not personal views. It found that he had changed his views on public accomodations and that he was not actually opposed to school desegregation. In dealing with a variety of sweeping statements on civil liberties issues, the Senators relied on the advocacy argument, on statements praising freedom of speech, free press, and other civil liberties before the committee, and on favorable excerpts from congressional testimony and speeches. The majority concluded that, "He sees both sides of the difficult questions in this area, which require working out the delicate balance established by the Constitution between the rights of individuals and the duty of government to enforce the laws."(Report, 13-20) Both Mr. Rehnquist and his advocates promised the country a fair and balanced judge who would not be rigidly ideological and would be open to the claims of all who came before the court. He would not be, they argued vigorously and successfully, the kind of judge who would always vote against civil rights and equal protection and whose vote could be easily predicted without even knowing any specifics of a case.

Justice Rehnquist's Record on the Court.

If there is one thing that is readily apparent from examining the way Justice Rehnquist has voted in more than 3000 cases and the opinions and dissents he has authored is that the critics were right and the supporters were wrong in their predictions of the meaning of the appointment for litigation affecting minority rights and civil liberties, particularly rights of accused criminals. Mr. Rehnquist immediately placed himself at the extreme right of an increasingly conservative court and has remained there term after term through fifteen years of changing membership and evolving issues. His record in many areas has been almost totally predictable. Whatever the issue, no one on the court is less likely to vote to sustain a claim of minority rights under the equal protection clause and no one is more likely to defend the police against any allegation of unconstitutional action.

One way to understand the extremist nature of his position is to compare it with that of the other conservative justices appointed by President Nixon and President Reagan. One way to look at this question is to use the statistics on Supreme Court voting published annually by the Harvard Law Review and the analysis of the first decade of the Burger Court by Prof. Russell Galloway of the Supreme Court History Project. Galloway's study shows that during the 1969-71 period "the Court underwent one of the most dramatic alterations in its history" as "the liberal wing was decimated and the conservative wing rejuvenated...." When Rehnquist came on the court "control rested in the hands of seven conservatives and moderates led by the conservative four-vote Nixon bloc." The Nixon justices were strengthened in the mid-1970s by the movement of the Court's moderates in a more conservative direction. In these circumstances conservatives dissented far less and concentrated more on influencing majority decisions that became the law of the land.

As the years passed, each of the other conservative Justices showed some signs of increasing independence of judgment and changing voting patterns as new issues arose. By the October 1977 term of the Court, for instance, both Justice Powell and Justice Blackmun had moved toward more independent patterns of disagreement or agreement on issues on particular cases. Rehnquist remained firmly rooted at the extreme right and had by far tne highest dissent rate of the members of the dominant conservative faction. His dissents were often bitter and doctrinaire, even against fellow conservatives who deviated from orthodoxy in response to the special circumstances of the case before them.

The record is particularly striking in the field of equal protection. When I searched Justice Rehnquist's record through the term completed this July via the LEXIS computer system, I was astonished to receive an eight-foot long list of 96 equal protection dissents, five of them this June and July. Reading these dissents one after another for many hours it was very clear that this record was the product of a strongly committed, consistent, and closed mind operating in terms of a philosophy that ignored the realities of American race relations and offered virtually no hope to any minority group that had to rely on judicial protection for its rights.

Professor Davis' 1984 article on Justice Rehnquist's equal protection record offers clear measurements of his voting record. To that point, she said, "Rehnquist has never voted to uphold a school desegregation plan." Of the seventeen cases of sex classifications in laws that had come before the court, the majority of the justices had struck down more than half but Rehnquist had favored permitting continued different treatment in almost nine-tenths. On the cases about whether it violated equal protection to enact laws treating illegitimate children differently he voted to uphold all of the challenged state laws punishing children for their parents'sins. In a series of cases dealing with the rights of illegal aliens, Rehnquist diverged sharply from the court's majority.

Another study of Justice Rehnquist's record, by Prof. Robert Riggs of the Brigham Young Law School and Thomas D. Proffitt found that he was overwhelmly sympathetic to state and local governments in general when the validity of their actions were challenged. In criminal cases he voted against the rights claimed by the accused criminal in almost nine-tenths of cases from all levels of government. On the other hand he was far less likely than the court majority to vote for access to the federal courts or to sustain claims based on freedom of expression.(see tables 1 and 2).

The overall pattern of Justice Rehnquist's voting, in other words, is clear. He has strongly and consistently supported conservative positions. His record on equal protection and criminal rights cases shows exactly the opposite of what the Senate was told it could expect— a rigid and

Rehnquist Votes Compared With Court Majority For Cases In Which Government Was A Party, Decided By The Supreme Court During Its 1976-1981 Terms

Term	Votes For or Against State/Local Government				Votes For or Against National Government			
	Criminal Cases		Civil Cases		Criminal Cases		Civil Cases	
	For %	Against	For %	Against	For %	Against	For %	Against
1976								
Rehnquist	19 (86.4)	3	34 (81.0)	8	21 (95.5)	1	19 (86.4)	3
Court Majority	9 (40.9)	13	26 (61.9)	16	18 (81.8)	4	18 (81.8)	4
% Difference	(45.5)		(19.1)		(13.7)		(4.6)	
1977								
Rehnquist	15 (71.4)	6	32 (82.1)	7	14 (82.4)	3	26 (74.3)	9
Court Majority	8 (38.1)	13	22 (56.4)	17	9 (52.9)	8	25 (71.4)	10
% Difference	(33.3)		(25.7)		(29.5)		(2.9)	
1978								
Rehnquist	22 (81.5)	5	26 (74.3)	9	9 (81.8)	2	15 (53.6)	13
Court Majority	13 (48.1)	14	20 (57.1)	15	8 (72.7)	3	15 (53.6)	13
% Difference	(33.4)		(17.2)		(9.1)		(0.0)	
1979								
Rehnquist	19 (95.0)	1	29 (87.9)	4	21 (91.3)	2	27 (64.3)	15
Court Majority	9 (45.0)	11	15 (45.5)	18	14 (60.9)	9	27 (64.3)	15
% Difference	(50.0)		(42.4)		(30.4)		(0.0)	
1980								
Rehnquist	19 (79.2)	5	29 (87.9)	4	10 (100.0)	0	22 (75.9)	7
Court Majority	14 (58.3)	10	21 (63.6)	12	8 (80.0)	2	24 (82.8)	5
% Difference	(20.9)		(24.3)		(20.0)		(−6.9)	
1981								
Rehnquist	22 (100.0)	0	41 (70.7)	17	9 (90.0)	1	16 (59.3)	11
Court Majority	19 (86.4)	3	25 (43.1)	33	8 (80.0)	2	21 (77.8)	6
% Difference	(13.6)		(27.6)		(10.0)		(−18.5)	
Total								
Rehnquist	116 (85.3)	20	191 (79.6)	49	84 (90.3)	9	125 (68.3)	58
Court Majority	72 (52.9)	64	129 (53.8)	111	65 (69.9)	28	130 (71.0)	53
% Difference	(32.4)		(25.8)		(20.4)		(−2.7)	

TABLE 2

Rehnquist Votes Compared With Court Majority For Cases Raising Issues Of The Exercise Of Federal Court Jurisdiction, Freedom Of Expression, And The Validity Of State Acts, Decided By The Supreme Court During Its 1976-1981 Terms

Term	Votes For or Against Validity of States Acts		Votes For or Against Federal Jurisdiction		Votes For or Against Freedom of Expression	
	For %	Against	For %	Against	For %	Against
1976						
Rehnquist	58 (85.3)	10	4 (19.0)	17	2 (15.4)	11
Court Majority	38 (55.9)	30	7 (33.3)	14	6 (46.2)	7
% Difference	(29.4)		(−14.3)		(−30.8)	
1977						
Rehnquist	54 (78.3)	15	5 (33.3)	10	2 (18.2)	9
Court Majority	34 (49.3)	35	7 (46.7)	8	4 (36.4)	7
% Difference	(29.0)		(−13.4)		(−18.2)	
1978						
Rehnquist	53 (79.1)	14	10 (40.0)	15	1 (14.3)	6
Court Majority	38 (56.7)	29	11 (44.0)	14	1 (14.3)	6
% Difference	(22.4)		(−4.0)		(0.0)	
1979						
Rehnquist	52 (85.2)	9	13 (50.0)	13	0 (0.0)	12
Court Majority	27 (44.3)	34	22 (84.6)	4	7 (58.3)	5
% Difference	(40.9)		(−34.6)		(−58.3)	
1980						
Rehnquist	52 (77.6)	15	5 (21.7)	18	0 (0.0)	7
Court Majority	38 (56.7)	29	9 (39.1)	14	3 (42.9)	4
% Difference	(20.9)		(−17.4)		(−42.9)	
1981						
Rehnquist	64 (77.1)	19	18 (36.7)	31	5 (38.5)	8
Court Majority	39 (47.0)	44	24 (49.0)	25	7 (53.8)	6
% Difference	(30.1)		(−12.3)		(−15.3)	
Total						
Rehnquist	333 (80.2)	82	55 (34.6)	104	10 (15.9)	53
Court Majority	214 (51.6)	201	80 (50.3)	79	28 (44.4)	35
% Difference	(28.6)		(−15.7)		(−28.5)	

Source of Tables: R. Riggs and T. Profitt, "The Judicial Philosophy of Justice Rehnquist," 16 Akron L. Rev. 555.

closed mind, less sympathetic to plaintiffs claiming Constititional rights than any other Justice in recent history. There is very little evidence that the robe has changed the man.

The general pattern is distressing but it adds a great deal to the statistical analysis to read individual decisions. In his response to the great issues that came before the court, both the implications of Rehnquist's legal and political philosophy and the nature of his personal values become much clearer.

Rehnquist's opinions on minority rights issues rarely show any serious effort to understand either the nature of the substantive problem or the extent to which a group has come to court because it has been totally impossible for them to obtain any recognition of their rights from the elected branches of government for a very long time. These questions are irrelevant, in Rehnqist's view because he believes that the Constitution offers virtually no protection against governmental action to women and many other groups and only minimal protection to minority groups that can surmount extraordinary burdens of proof. Often he disposes of equal rights claims on technical grounds, treating the issue as simply one or deductive logic.

His values come out most clearly, however, in dissents, when he passionately disagrees with some action the Court's majority has taken, particularly in the fields of school desegregation and affirmative action. In these cases the legal technician gives way to the angry partisan using a combination of bitter attacks, cynical satire, and predictions of doom.

Rehnquist's dissent in Steelworkers v. Weber , 443 U.S. 193, assails the Court's approval of a voluntary agreement by labor and management to implement minority hiring goals to overcome a history of discrimination in the firm. In his dissent, Justice Rehnquist accuses his colleagues of engaging in the doublespeak and big lie techniques described in George Orwell's, 1984 , a biting satire of a totalitarian state that constantly engages in official lies. He claims that the majority is concocting false "legislative history: and engaging in "a tour de force reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini...." He is characteristically uninterested in the nature of the problem the agreement was supposed to address, saying merely that virtually no black craftsmen had been hired earlier because "few were available in the Gramercy area...." We do not learn why they weren't available or why workers could be found after the voluntary plan was adopted. That is not relevant. In his conclusion, Rehnquist describes affirmative action as "a creator of castes, a two-edged sword that must demean one to prefer another." He warns apocalyptically that "later courts will face the impossible task of reaping the whirlwind."

In a decision handed down less than a month ago, Local Number 93 v. City of Cleveland, Slip Opinion, July 2, 1986, Rehnquist continued this battle. He attacked the Court's decision sustaining a voluntary consent agreement between the firefighters union and the Cleveland city government providing policies to increase the promotions of black and Hispanic firemen. He called it "simply incredible" that the majority "virtually read out of existence" the evidence on Congress' intent. He argued that the plan harmed whites and that no minority worker should receive any special treatment unless that individual could "prove that the discriminatory practice had an impact on him." There was, once again, no significant discussion of the nature of the historic discrimination, the desirability of voluntary change, or the likelihood that the remedy he preferred would have worked.

Another dissent came this June in Sheet Metal Workers International Assoc. v. EEOC, 54 LW 4984 (June 24, 1986) The Court's majority found the order of the lower court to be "properly and narrowly tailored to further the Government's compelling interest in remedying past discrimination." Rehnquist's dissent objected to "ordering racial preferences that effectively displace non-minorities." Here and elsewhere we find the special solicitude for the rights of whites that is so characteristic of the policy of the Reagan Justice Department and the Reagan civil rights offices.

Rehnquist has also been the leading dissenter on school desegregation. His dissent in the 1973 Denver case, Keyes v. School Dist. No. 1, Denver, Colorado,413 U.S. 189, was the first major dissent after eighteen years of unity by the court following the 1954 decision. He called this decision extending desegregation to Northern cities a "drastic extension of Brown." Since that time there have been no significant expansions of desegregation law, primarily because the Nixon majority cut off the possibility of city-suburban desegregation in most circumstances in its 5-4 decision in the Detroit case. Nonetheless, Justice Rehnquist has very strongly objected to the Court's permitting metropolitan desegregation to take place in Wilmington, Deleware and to the Court's reaffirmation of the Denver decision in the 1979 Dayton and Columbus cases. Had Rehnquist's position prevailed there would have been large-scale return of minority students to segregated schools.

When the Supreme Court declined to review the Wilmington order in 1975, Rehnquist dissented, calling the remedy "more Draconian than any ever approved by this court." He claimed that his colleagues were ignoring the Detroit decision and accepting "total substitution of judicial for popular control of local education." (Deleware State Board of Ed.. v. Evans, 446 U.S. 923). In another dissent at a later stage of the case he said, "My dissent ... is based on my conviction that it is extraordinarily slipshod judicial procedure as well as my conviction that it is incorrect."(Buchanan v. Evans, 423 U.S. 963)

Rehnquist's role was much more extensive in the case of Columbus, Ohio, which led to the last major decision by the Supreme Court to the present. Columbus was due to implement a large desegregation plan in September 1978. In mid-August, after the Justice for the Circuit, Potter Stewart, rejected an application for a stay, Rehnquist signed a stay that cancelled the entire desegregation plan affecting 42,000 students just before school opened. When the case was heard later by the full Court and the decision rejected his preference for requiring proof of violations for each individual school to be desegregated he dissented very strongly, denouncing the decision as "as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system."

He attacked his brethern for "lick and a promise" opinions and a "radical new approach" which created a "tight noose" on school boards.

He claimed that the Supreme Court, in reaffirming the Keyes decision, was following a policy he described as "integration über alles," a takeoff on the Nazi anthem. He charged the majority with creating a "loaded game board" and acting like "Platonic Guardians", superceding local democracy. The decision, he said, violated the "intellectual integrity" of the Court. As in the case of affirmative action, he used the image of dictatorship to describe civil rights plans

In one striking part of his Columbus dissent, Rehnquist clearly identified with the Court's white critics. "Our people," he wrote, "instinctively resent coercion, and perhaps most of all when it affects their children and the opportunities that only education affords them." Obviously, "our people" referred to the white opponents not the black supporters of the court order. Nor was there anything about the black allegations, which had convinced the majority, that their children had been coerced into segregated schools and denied the "opportunities that only education affords them." (Columbus Board of Ed. v. Penick, 443 U.S. 449.)

It would be possible to extend this discussion of cases, quoting from dissents finding it permissible for school boards to take books they don't like out of libraries, supporting discrimination against illegitimate children, allowing school boards to arbitrarily fire teachers early in their pregnancies, allowing resident aliens to be denied benefits of college assistance programs, allowing a property qualification for voting and many others. Two other examples from the field of minority rights, however, should suffice to illustrate Rehnquist's approach. The first deals with the battle over tax privileges for openly discriminatory private schools. The second with rights of Indian tribes.

The Bob Jones Univ. case (461 U.S. 574) was one of the most celebrated of recent years, featuring a dramatic change of position by the Reagan Justice Department, an extraordinary appointment of an advocate for the government's former position by the Supreme Court, a major congressional controvery and an embarassing defeat for the Administration in court. Rehnquist found nothing wrong with the policy of tax exemptions for segregated schools, finding that Congress had no intent to deny them when it acted in 1894 and 1913 on tax legislation. He said that it would not violate the equal protection clause of the Constitution if Congress were to pass a law granting exemptions to "organizations that practice racial discrimination." Unless someone could prove that their practices were "intended" to discriminate, policies that had the effect of discrimating could not only be accepted but subsidized.(footnote 4).

Few groups have had a more miserable experience dealing with both state and federal governments than American Indians. Solemn promises and eternal guarantees have been violated with monotonous regularity. As an extremely small and impoverished part of the population, often subject to severe local discrimination, Indians rarely have success in achieving political reforms. The degree to which the federal courts will protect the rights of the Indians and their tribes is an important test of American justice.

In a 1980 decision, Washington v. Confederated Tribes, Rehnquist dissents from a majority decision saying that there is no need to balance interests to determine the tax immunity of a tribe (an issue which is of the greatest importance in determining the viability of tribal economic activities) but that the courts should simply enforce whatever they think Congress wished. In a footnote that has a peculiarly ironic ring for students of Indian history, Justice Rehnquist attempts to offer reassurance:

> ... Indian tribes are always subject to protection by Congress. This source of protection is more than adequate to preclude any unwarranted interference with tribal self-government. Congress, and not the judiciary, is the forum charged with the responsibility of extending the necessary level of protection.... (447 U.S. 134, footnote 11)

Many tribes have, of course, been "protected" out of almost all of their resources and many of their rights and immunities. A similar attitude appears in other cases, including one just decided, Three Affiliated Tribes v. Wold Engineering, Slip Opinion, June 16, 1986, in which he dissents from Justice O'Connor's opinion against a North Dakota state law denying tribal access to state courts unless the tribe waives its sovereign immunity on all issues under state law. In characteristic Rehnquist fashion the decisions are abstract and ideological, there is no grappling with the realities of the problems encountered by the powerless, and history is recast in a way that simply denies the conflict between democratic institutions and minority rights that is so fundamental in the history and law of minority rights litigation.

The Basis and Significance of the Record.

Mr. Rehnquist's record on the rights of minorities and women is no accident. It grows directly out of a legal philosophy that makes it almost impossible for minorities to win in court. It is a philosophy based on a radical rejection of the extension in the protection against discrimination that grows out of almost a half-century of litigation and landmark Supreme Court decisions. Rehnquist believes that those precedents are largely based on a misunderstanding of the Constitution and that he has the correct understanding of the intent of the framers. In Mr. Rehnquist's view, spelled out in many decisions and in his article,"The Notion of a Living Constitution," the framers of the Fourteenth Amendment, for example, had no intention to protect women or any other non-racial minority group against discrimination and thus there is no constitutional basis for a serious challenge to unequal laws. So far as minorities are concerned, he believes that the 14th Amendment was intended to address the problems of the last century in the South, not the problems of contemporary blacks and Hispanics.

When claims are raised by racial minorites, who, Rehnquist concedes, do have a right to come to court under the Fourteenth Amendment, a number of the other elements of his legal philosophy come into play. He favors policies making it more difficult to come into federal courts by favoring state court jurisdiction and limiting standing. He believes that it is not sufficient for racial minorities to prove that official decisions had the consistent and foreseeable consequence of discrimination but that they must also prove the intent to discriminate, something that is exceedingly difficult given the reluctance of officials to admit to racial prejudice or intentional violations of minority rights. Even if there is intent, he favors a standard of proof that would require civil rights lawyers to show that each individual school was intentionally segregated and that each individual minority worker receiving a remedy was personally victimized by discrimination. Under his standards it is doubtful that all the civil rights lawyers in the U.S. could desegregate thoroughly one major corporation or one major urban school district. Certainly there would be no trial court capable of handling the volume of evidence that would be required. Such a standard would, in all probability, end school desegregation litigation and reduce employment discimination cases to a relatively small number of individual grievances. Affirmative action requirements would vanish and school districts would be free to dismantle desegregation plans affecting millions of students, sending the black and Hispanic children back to their segregated and unequal schools.

Mr. Rehnquist's jurisprudence does not discuss the question of whether or not a remedy will work or whether or not it will solve the problem the minority plaintiffs bring to court. (He does, however, discuss with urgent concern the effect of court-ordered remedies on whites.) His concern is with limiting the range of judicial action to the greatest possible extent, noc with assuring that the institutions are changed so that the operate in genuinely not racial ways or provide genuinely equal opportunities to the groups previously victimized by discrimination.

One of the most disturbing elements of Rehnquist's decisions is the way in which his ideology and philosophy swamp any serious treatment of the facts of the case and the situation of the individual or group appealing for justice. The reader finds not a searching and illuminating consideration of the particular problem and a difficult balancing of rights, practical conditions, and possible remedies, but the forcing of the particular facts into a preformed mold, even if it requires filtering out much of reality.

At its worst, the Rehnquist technique devolves into recreating the facts to fit the preconceptions, ignoring important parts of reality and slanting both the description of the facts and the opposing legal arguments in ways that result in a systematic distortion of the case's central features.

These problems are skillfully illustrated in an analysis of the way in which Rehnquist reshaped the case of a Louisville man claiming that his rights had been violated by the printing of his name and photo in a widely distributed police brochure entitled "Active Shoplifters" even though he had never been tried or convicted of the offense. Professor Robert Weisberg analyzes the way in which the issues in this case are restructured in Rehnquist's opinion to justify denial of the plaintiff's claim. Rehnquist's statement of the facts of the case, for instance, is the first sign of the problem. Before the reader ever learns about the claim of the Louisville man there are twenty lines setting up the problem from the perspective of the local police. By the time we find out about the plaintiff's allegation "the reader has assimilated a pleasant picture of two dutiful officers ... who 'agreed to combine their efforts' to prevent crime, all of this 'during the Christmas season.'" The uncomfortable fact that a man who was never tried should be presumed innocent and not publically proclaimed as guilty and as a continuing "active shoplifter" led to a strange characterization. Rehnquist said that "his guilt or innocence of that offense had never been resolved, although later the shoplifting charge was 'finally dismissed.'" The process of stacking the deck proceeds:

> To appreciate the structure of *Paul v. Davis*, we need only start with Justice Rehnquist's overt compartmentalization. Prior to part I, he sets forth the "facts."[292] These fifty-nine lines thus are made to seem almost by-the-way; yet, as we have indicated, they serve a vital coloring function.[293] It is only in the sixty-four lines that constitute part I,[294] however, that Justice Rehnquist educes his basic structuring thesis: Davis, through the temerity of his claim, challenges an ordered system of law. Masterful in its progression, this part builds on the reader's skepticism, imbued earlier, about a respondent who, after all, *had been arrested*.[295] Justice Rehnquist continues to depict Davis as opposing, in turn, the basic premises of the federal system,[296] the police who are trying "to calm the fears of an aroused populace,"[297] the natural limits of legal liability,[298] and the studious reflectiveness of the Court itself.[299] . . . .

> Justice Rehnquist cogently chooses words to set Davis up against one or more of his audience's basic values. We noted the centrality to substance of the embellishing words "concededly," "transmuted," "drafted," and "shepherded."[301] The concluding phrase, "a study of our decisions convinces us they do not support the construction urged by respondent,"[302] climaxes the mounting sense of uneasiness about Davis. Davis has challenged the police, and, according to Justice Rehnquist, the legislative drafters of a noble amendment; but his gravest offense, it seems, is attempting to distort the studious processes of the Supreme Court itself. . . .

> To convince his audience that the court below should have been more reflective, Justice Rehnquist immediately introduces the primary formal device of the rest of the opinion: the positing of "premises" from which his logic seems inevitably to flow. But these premises, usually expressed in what Cardozo called the "type magesterial,"[304] are often crafted out of Justice Rehnquist's whole cloth.

The analysis offers many more examples, but they are not important here. The basic observation of Professor Weisberg and my basic impression in reading scores of opinions and dissents is that all too often they read like preconceived decisions seeking a rationale, often at considerable cost in ignoring or distorting the facts. This approach helps to explain the extrme conclusions that Rehnquist reaches compared with his fellow conservatives.

Mr. Rehnquist's orientation toward politics and toward issues on the court has been one of extraordinary consistency and predictability and there are no signs of significant growth or change. He has never believed that law should change existing racial arrangments, except to deal with a few individual problems. For the rest, Rehnquist believes that the courts should do nothing, that governmental action is counterproductive, that the white majority will take care of any real problems through the democratic process, and that there should never be remedies that aid blacks or Hispanics as a group in ways that deprive whites of some opportunities.

One dominant impression of Mr. Rehnquist's writing is that he lives in another country. It is a country where minority legal claims are only intellectual puzzles and where those claims and the half century of decisions implementing them are misguided. It is a world where blacks and Hispanics coming to court asking for more and different governmental action are almost always wrong and where police defending their kinds of controversial governmental action are almost always right. It is a world where a main threat to the social order is from courts which are unfair to whites and to local control.

The basic problem is not that Justice Rehnquist does not believe what he writes or that he does not often express it in an interesting or arresting way. The problem is that there is little relationship between the historic and contemporary experiencs of minority people in the U.S. and the version that exists in Rehnquist's mind.

Were Rehnquist to lead a court with the kind of majority that could be created by two or three additional appointments we would risk repeating one of the most disgraceful stories in our legal history, the Supreme Court's emasculation of the laws and constitutional amendments of the Reconstruction which culminated in the 1896 Plessy decision. The courts accepted and legitimated the erection of the system of de jure segregation in the South and closed the door to minority litigants, with few exceptions, for almost sixty years. The specific issues would be different but the consequences would be very similar if Rehnquist's views became the law of the land.

If minorities and women are to share confidence in our legal system and hope for justice and opportunity in our society, it is very important that leading figures in the white community take this nomination seriously as a statement about our future. We are not selecting a law professor or a philosopher. We are selecting the leader of our system of justice, a leader who may serve into the next century. I believe that most Americans and most members of Congress are proud of what we have accomplished in moving toward equal rights and few wish to turn backwards. This nomination is a symbol of retreat and reaction from our common dream. It would threaten shrinkage of the rights of millions of Americans. I urge the members of the Senate to withhold their consent and to advise the President to submit a nomination of a Chief Justice who can help a deeply divided court deal with the problems of a divided society with growing inequality.

The CHAIRMAN. The distinguished Senator from Delaware.

Senator BIDEN. One brief question for each of you, a different question.

Mr. Askin, how do you respond to the assertion made that Justice Rehnquist was left with a Hobson's choice in the *Laird* v. *Tatum* case—it is getting late; almost 11:00 o'clock—*Tatum* case, to which you spoke, and that is, that had he not sat and voted, the Court would have been deadlocked and the Nation would have been deadlocked on a very critical issue?

Mr. ASKIN. There was no Hobson's choice at all. The only thing that would have happened, if Justice Rehnquist had recused himself, there would have been a trial; perfectly reasonable thing to happen. There would have been a trial. We would have had an evidentiary hearing, which was the appropriate thing to happen; not to make a decision based on factual claims and assertions, including Justice Rehnquist's own testimony as Attorney General before the Senate Investigating Committee, where there has never been an evidentiary hearing, and never a trial.

Senator BIDEN. Thank you.

Mr. ASKIN. There was no Hobson's choice whatsoever. There was a very clear choice—that he should not have participated, and we would have gone ahead and had a trial. No law would have really been created at all.

Senator BIDEN. Ms. Verveer, what is the single most important objection that your organization has to Justice Rehnquist? Is it because he will impact more heavily on the direction of the Court as Chief Justice, or because it is a second shot at a sitting Justice—do you understand what I am getting at?

Ms. VERVEER. Senator, we have not taken a formal position on the nomination. What we are here to——

The CHAIRMAN. If you do not mind, speak in your loudspeaker there.

Ms. VERVEER. The organization has not taken a formal position on the nomination. But we have a number of concerns that I think have been articulated very clearly over the last 2 days. And I think those surround the two major issues, of his commitment to equal justice, and his commitment to the constitutional liberties guaranteed by the Bill of Rights.

And we are here to urge the Senate to assure the American people where he stands on these issues so they can have the kinds of assurance I think that they demand.

Senator BIDEN. Thank you very much.

Professor, it is good to see you. You are one of the foremost people in the country on matters relating to 14th amendment questions.

How do you respond to the assertion that, notwithstanding your description, Justice Rehnquist finds himself in a solid minority—not the majority at this point, but a solid minority—on a number of the issues that you raised as being so extreme?

In other words, his extreme views seem to be shared by more than himself on the Court. Are there more than one extremist on the Court, or is he different than he stated? Do you understand what I am driving at?

Mr. ORFIELD. Yes.

I think it has been a conservative court since 1971, by any reasonable standard. There are many conservative majorities on that Court.

The thing that distinguishes Justice Rehnquist is that every term he is always at the extreme conservative edge. As he said more or less himself today, and according to the Harvard Law Review's published analysis every term, and he is there. And if you look at individual issues, especially these kinds of equal protection issues, that is where he is as well.

You see each of the other conservative judges going through some kind of evolution and some kind of deepening. I think that that is something that we often see in the trial courts when we are having civil rights cases. We see judges confronting the kinds of terrible problems there are in our society, and thinking about the hard choices, and realizing that the political process is not going to solve them all. So you see other judges moving and making different kinds of decisions. But every year you see Justice Rehnquist in exactly the same place.

Senator BIDEN. I thought it was interesting that the two cases which Justice Rehnquist cited to show growth and that he changed his mind were cases where he changed his mind to become more restrictive in applying constitutional principles.

Mr. ORFIELD. Another thing that you see is, that if you analyze the dissents, among the dominant conservative group, he has by far the most dissents. And he often dissents fairly angrily against his own conservative colleagues when he thinks they make a mistake, like approving an affirmative action——

Senator BIDEN. It is clear to me he is the most conservative. I just have not made up my mind, and I am going back to reread, and read in the first instance, about half a dozen cases which were mentioned here, as to whether or not he can accurately be characterized as extreme.

But at any rate, I appreciate your testimony and your explanation, and the entire statement has been put in the record, and I am anxious to read it all.

For my part, I thank you all.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Mr. Askin, do you believe that the Justice violated the canons of ethics in participating in the decision in the *Tatum* case?

Mr. ASKIN. I believe he violated the most basic canon of all, that you cannot be both an advocate and a judge in the same case.

I think that canon is taken for granted.

Senator KENNEDY. Well, he talked about his obligation and his duty to sit. He spent a good deal of time of that in his memorandums that he has made available to this committee. He indicated that if he failed to meet that duty, he was failing to meet his responsibility, and quoted a lot of cases before the Supreme Court.

Mr. ASKIN. I think he invented a bizarre doctrine which no one has cited since, that somehow or other, when your vote really counts, then you do not recuse yourself. That is the time when you do recuse yourself, when your vote is going to be decisive.

He said, if your vote is really meaningful, then you cannot do it. Even though you have a conflict, you have to sit. That is turning the rules of ethics on their head.

Senator KENNEDY. In his memorandums, he indicates that you cannot go to the Court without some view of the Constitution; that he responds to constitutional issues in a broad way and that he has to apply them; and that therefore he had a duty to sit. Although it referred to various constitutional questions and issues, in his memorandums he talked about the application of law in his exchange with Senator Ervin.

What is your response to that aspect of his memorandum that justifies his duty to sit?

Mr. ASKIN. I believe his memorandum concealed more than it revealed. He makes vague statements. This is his——

Senator KENNEDY. Are you making the charge that it was dishonest, intellectually dishonest?

Mr. ASKIN. I think it was flimsy. Yes, I think it concealed a lot. I am not going to characterize, but I think it was very flimsy. I think it concealed an awful lot of the truth.

Senator KENNEDY. Well, why would he do that? What would be his motivation?

Mr. ASKIN. Well, the only motivation I can discern is that he wanted to protect his former colleagues in the Justice Department—and clients, they were really his clients—because he represented them before Senator Ervin's committee—from having to stand trial.

That is all that was going to happen. To go back to Senator Biden's earlier question, I should point out this complaint was dismissed in the District Court on motion; there was never any evidentiary hearing. The District judge said the complaint on its face failed to state a claim. He threw it out. There was never any evidentiary—the Court of Appeals reversed that. In a two-to-one decision, the Court of Appeals said plaintiffs have a right to have a hearing and a trial, and if they can prove their allegations, they may be entitled to an injunction enjoining the Army from carrying out its domestic intelligence program.

So we still had never had an evidentiary hearing when it gets to the Supreme Court. The only thing that would have happened if the Court of Appeals' decision had been affirmed, we would have gone back and finally had a hearing on the plaintiff's allegations that the Army was engaging in this illegal and illicit program of spying on civilian political activity. That is all that would have happened.

Senator KENNEDY. And this was at a time that he was a counsel for the Defense Department; is that correct?

Mr. ASKIN. That is correct. He represented them before Senator Ervin's committee.

Senator KENNEDY. And this is at a time when allegedly he was writing or making decisions about what could be done in terms of surveillance of American citizens; what could be done with regards to the military in terms of public demonstrations in opposition to the war.

He was counsel for the Defense Department. He was writing memorandas on this. He had indicated what his position before was going to be, in response to Senator Ervin's statement. He still made the judgment to cast the deciding vote. And as a result of that, as I characterized earlier, there was a denial of discovery that could have revealed a whole host of irregularities, potential violations of civil rights and civil liberties, as we later saw as a result of the plumbers, the Houston plan, the whole range.

Now, do you find—let me just ask you out of the blue—do you find it somewhat interesting that in the request of the members of the Committee to the Office of Legal Counsel that we are being denied the various memoranda of Mr. Rehnquist on those types of activity?

Mr. ASKIN. Absolutely, Senator.

Senator KENNEDY. Do you think it is important for this committee to get them?

Mr. ASKIN. It is extremely important.

Senator KENNEDY. Why?

Mr. ASKIN. Because it is probably time that we got to the bottom of this thing.

Senator KENNEDY. Why is that important? That was a long time ago.

Mr. ASKIN. Oh, I do not think it is so long ago. I think we still live with it. There are indications of resurrection of surveillance activity today, more of this kind of spying on political activity. I think we ought to get to the bottom of what was going on back then, and indeed if Justice Rehnquist had not cast that deciding vote in 1972, maybe we would have gotten those memorandums in our discovery at trial. We might not still be fighting for them 14 years later if he had not cast that deciding vote, but had let this case go to trial, and we would have gotten to the bottom then of what had been going on.

Senator KENNEDY. What we are talking about is the range of activities including wiretapping of individuals, the penetration of domestic organizations that were in opposition at that time. We are talking about the active surveillance, the use of the American military in terms of surveillance of American citizens, probably the greatest threat in terms of individual rights and liberties of American citizens in recent times.

What we are talking about is our committee being denied the kinds of indications of how Mr. Rehnquist views First Amendment, civil rights, civil liberties at an extremely important time. And that might be of value to the American people in instructing their members of the Senate on their value of these liberties.

Mr. ASKIN. Absolutely, Senator Kennedy. And I think it would also be good to know whether the future Chief Justice of the United States really had some participation in this. I have no idea. It would have been nice to get to the bottom of it.

Senator KENNEDY. It would be reassuring to the American people——

Mr. ASKIN. Yes, it would be.

Senator KENNEDY [continuing]. If it was demonstrated as a result of those that he had a strong commitment to those rights and liberties, and that, I think, would be very, very instructive and important that they understand that and we do not know that.

Mr. ASKIN. That is correct.

Senator Kennedy. And he has indicated—I think it is important for the record—that he is prepared to see that that material is available.

Mr. Askin. I heard him say that today.

Senator Kennedy. But it is, I think, a disservice to the American people that we are not permitted to get that. I thank the Chair.

The Chairman. The distinguished Senator from Vermont.

Senator Leahy. Mr. Chairman, I will be brief. I just have a question for Professor Askin. Earlier in the testimony, yesterday, in fact, I asked a whole series of questions of Justice Rehnquist regarding *Laird* v. *Tatum* and went very much into the question of whether he was aware when he was at the Department of Justice of any of the disputed evidentiary facts in *Laird* v. *Tatum.* And I think it is a fair summary of Justice Rehnquist's testimony to say that according to him he was unaware while at the Department of Justice of any of the disputed evidentiary facts in *Laird* v. *Tatum.* Is that your understanding and recollection?

Mr. Askin. Senator, the problem is he may not have known the facts. The problem is he testified before Senator Ervin's committee as if he did know the facts and then voted on those facts, those alleged facts in the Supreme Court while the plaintiffs were standing outside saying we want a hearing on these facts. The basic fact was had the Army discontinued its domestic intelligence program. That was fact No. 1. The Army said, well, we really do not do it anymore. This case is really moot. You are making a tempest out of a teapot. Assistant Attorney General Rehnquist went before the Irvin committee, testified to that fact. Maybe the Army told him that. I do not know if he was testifying from his own personal knowledge. He told Senator Ervin's committee as follows. He does not quote the whole statement in his memorandum. He says,

> The function of gathering intelligence relating to civil disturbance which was previously performed by the Army as well as the Department of Justice has since been transferred to the Justice Department. No information contained in the data base of the Department of the Army's now defunct computer system has been transferred to the Internal Security Division's data base.

Now, that was a fundamental fact issue. The plaintiffs in Tatum were screaming, "We do not believe they have disbanded it." There was never an evidentiary hearing. The Government only claimed that in their briefs. There was never a hearing. We had evidence to the contrary, indications to the contrary. We wanted a hearing.

Assistant Attorney General Rehnquist tells this to the Ervin committee. The Government tells it to the Supreme Court in its brief. It shows up in the majority opinion for which Justice Rehnquist becomes the fifth vote: Well, the Army has dismantled their system anyway; there is really nothing going on. But that was a basic evidentiary dispute that nobody ever had a hearing over.

Senator Leahy. So your assumption is, based on what he said in the Ervin committee, that he was aware of some of the disputed evidentiary facts.

Mr. Askin. Well, he claimed to be. Whether he really knew or not, I do not know. He claimed it. He testified to this as a fact and then voted for it in the majority opinion. And we said it was not a fact.

Senator LEAHY. In fact, he said you did not have standing, did he not?

Mr. ASKIN. Well, ultimately, he said there is no standing. But he had already also testified before Senator Ervin that we had no standing.

Senator LEAHY. That is right. But he testified before Senator Ervin you did not and then he found that.

Mr. ASKIN. And then he does not quote that statement in his memorandum either. He says, well, I made some comment on the law before Senator Ervin's committee, but he never quotes the sentence: "My point of disagreement with you, Senator, is to say whether, as in the case of Tatum versus Laird," et cetera, et cetera, and then goes on to say, "There, there is no justiciability," which he then goes on the court and in time to vote for it. It is a rather, I think, bizarre episode in judicial ethics, very frankly.

Senator LEAHY. Thank you. This is a point I wanted to cover because about 90 percent of the questions I have asked Justice Rehnquist in these 2 days of hearings has been on the *Tatum* case. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. I believe I will not ask any questions. I will try to expedite it.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman. I am sorry I was not here for the testimony of the three witnesses, but I have been glancing through the testimony. Professor Orfield, if I can just read a few sentences from your testimony:

> One of the basic problems faced by minorities and women is their relative powerlessness. They have few representatives within Government and at the top levels of private organizations. More seriously, they face a political environment where the representatives of the status quo generally command most of the resources, where politicians often have more to gain from creating fears of change than from responding to minorities. This is particularly true on matters of race relations where antichange politicians can often exploit racial fears and prejudices of the majority.

For that reason—and I accept what you have to say—it seems to me the position of Chief Justice is important beyond the vote cast; it is that symbolic role that I have asked you people about. As you have studied the record of Justice Rehnquist, have you seen change or moderation in his record as it deals with minorities?

Mr. ORFIELD. No. Even the decisions that were handed down early this month were consistent with this entire record. Within the last 2 months there were decisions on affirmative action. Both held against affirmative action, two dissents. There was a case very recently on Indian affairs that was very disturbing in that he said any problems that Indians had could be taken care of by Congress. That would protect them; the courts did not really need to. He disagreed with Justice O'Connor on that one. I find his record one of stunning consistency. Among all of the political or judicial figures I have looked at, the level of agreement throughout his entire career in terms of where he comes out on these kinds of issues is astonishingly consistent, and it goes up right to the present. And he said here today that you could not really expect substantial change, that his basic values were what you would be seeing in all likelihood in the future. And I believe that is true. The robe did not change Justice Rehnquist.

Senator **Simon**. You may have heard Dean Griswold testify.

Mr. **Orfield**. Yes.

Senator **Simon**. He said he thinks that rather than the Chief Justice designate influencing others, as Chief Justice the others might influence him. I gather you differ with that judgment.

Mr. **Orfield**. I think what one would have to say, unless Mr. Rehnquist's life is going to change in some kind of really sudden way, like Paul on the road to Damascus; it seems to me that what we have seen is what we have got. I was here in 1971 and many Senators and their staff people were saying that then, that once he gets on the Court he will be different, that it will be like Justice Black or like Justice Frankfurter, who he referred to frequently in his testimony in 1971. He was not. It was exactly like William Rehnquist, the private citizen, and William Rehnquist, the Nixon administration official. The Justice was exactly the same and he has continued to be. I think that the really disturbing thing about this is that this is the first time, so far as I know, at least in modern history, when we have somebody who has a perfectly clear record of almost always deciding against minority interests who we are about to put in charge of our basic system of justice in this country at a time when we have pretty serious and deepening racial cleavages and tremendous social change is going on in the role of women and other groups. I think it is a very reckless thing to do.

Senator **Simon**. I thank you. Thank you, Mr. Chairman.

The **Chairman**. Any more questions on the part of anyone? If not——

Senator **Heflin**. Let me ask one thing, Mr. Orfield. You mentioned that you participated in the confirmation process of Justice Rehnquist then. Did you testify?

Mr. **Orfield**. Yes.

Senator **Heflin**. Did you testify against him?

Mr. **Orfield**. Yes, I did.

The **Chairman**. Any other questions?

We thank you for your presence and your testimony. You are now excused. Our last panel is panel No. 10. I request these witnesses to come forward if they are here: Mr. Robert Ellis Smith, publisher, Privacy Journal. Is he here? Ms. Darlene Kalke, Center for Immigrants Rights. Is she here? Ms. Anne Ladky, Women Employed. Is she here? Ms. Marjorie Fujiki, staff attorney, Equal Rights Advocates. Is she here? Are not any of those people here?

We will allow them to put their statements in the record if they would like to do so. Any witnesses whose names I have called tonight who were not here, we will permit them to put their statements in the record.

We have 28 people to testify tomorrow. We will start at 8 o'clock in the morning. The minority has 4 hours and I will take just 2 hours. Is there anything, Senator Kennedy, you would like to say before we go?

Senator **Kennedy**. Thank you very much, Mr. Chairman. I look forward to tomorrow's hearing.

The **Chairman**. Senator Heflin, would you like to say anything?

Senator HEFLIN. I am ready to go home.

Senator KENNEDY. May I ask one?

Senator SIMON. Yes. I just might mention that Senator Clarence Mitchell was called earlier this evening. He was not able to be here, but would like to be listed tomorrow morning as a witness. I indicated to him that I thought we would try and accommodate him.

Senator KENNEDY. Clarence Mitchell, Mr. Chairman.

The CHAIRMAN. He will be here tomorrow, you say?

Senator SIMON. He will be here tomorrow morning at 8 o'clock.

The CHAIRMAN. I think we have his name on the list witn Ben Hooks and the others.

Senator SIMON. Yes.

Senator KENNEDY. Could I ask a question?

The CHAIRMAN. Yes, go ahead.

Senator KENNEDY. Mr. Chairman, we had the response of the Justice Department in denying our request under executive privilege for certain documents. I would like to suggest that the committee take the other important step of perhaps subpoenaing those documents. I know what we have to do is we get a majority of the members of the committee that would support such a subpoena, but I want to indicate to the Chair that I would favor such action. I will work with my colleagues to try and see if we cannot follow the procedures of the committee to see if we cannot obtain those documents. I wanted to indicate to the Chair tonight that that is the course that I am going to attempt to follow. I do not know what success I will have, but I think from the witnesses this evening, we have seen why obtaining this material is even more important for a balanced and informed judgment by the members of the Senate. I cannot expect that our distinguished Chairman would agree with me, but I have found that there are members of our panel who are supporting the Justice who may very well support this type of request. It does not have to be an overall, general subpoena. It can be targeted on the matters which have been of principal concern to the members of this committee. But I did want to put the Chair on notice that this is something that I am hopeful will be able to be achieved and that we will follow up with the Chair and the other members of the committee tomorrow on this.

The CHAIRMAN. I might say that I consider the matter closed. The Justice Department has claimed executive privilege, and as far as I am concerned, that terminates it.

If there is nothing else now, we are going to recess until 8 o'clock tomorrow morning at which time we will begin testimony again in this matter. We now stand in recess.

[Whereupon, at 11:18 p.m. the committee was adjourned to reconvene at 8 a.m. Friday, August 1, 1986.]

NOMINATION OF JUSTICE WILLIAM HUBBS REHNQUIST

FRIDAY, AUGUST 1, 1986

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee convened, pursuant to notice, at 8 a.m., in room SD-106, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Biden, Metzenbaum, Heflin, Hatch, Simon, Kennedy, DeConcini, Specter, Grassley, Mathias, Leahy, and Laxalt.

Staff present: Dennis Shedd, chief counsel and staff director; Duke Short, chief investigator; Frank Klonoski, investigator; Mark Gitenstein, minority chief counsel; Cindy LeBow, minority staff director; and Melinda Koutsoumpas, chief clerk, and Christopher Dunn, minority counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

We have a large number of witnesses today, 28 witnesses, and we have got to finish at 2 o'clock today. We are just taking 2 hours of that 6 hours and giving 4 hours to the other side.

Our first witness this morning is Representative Ted Weiss, president of Americans for Democratic Action. On this same panel we have Senator Clarence Mitchell III, president of the National Black Caucus of State Legislators. Is he here?

Senator Metzenbaum. He has been here. I am sure he will arrive.

The Chairman. Miss Eleanor Smeal, National Organization for Women. Miss Smeal, if you will come around. Miss Althea Simmons, NAACP. Miss Simmons, if you will come around. And Miss Judith L. Litchman, executive director, Women's Legal Defense Fund.

Now if you will stand up and be sworn. Do you swear the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Weiss. I do.

Ms. Smeal. I do.

Ms. Simmons. I do.

The Chairman. Have a seat.

Senator Metzenbaum. Mr. Chairman, I see the very distinguished Congressman Ted Weiss was sworn. We do not normally swear our congressional witnesses, and, certainly, a distinguished Member of the House, it is nice to welcome him as a colleague, and he chairs a committee himself over in the House. I am happy to see him out so bright and early with the other witnesses this morning.

Senator HEFLIN. How about me? I am here, too. I am up bright and early this morning; did not get to bed.

Senator METZENBAUM. My distinguished colleague on the left over here, and, quite often on my right, is always bright and early, no matter what time of the day.

Senator HEFLIN. I think the chairman should be commended, too.

The CHAIRMAN. The Senator from Alabama.

Senator HEFLIN. I think the Chair—I thought I could get your attention when I started talking about you. I said the chairman is to be commended for being here, because the Senate did not get out of session, I believe, until 1:30 last night, and so I think we all do our duty.

The CHAIRMAN. I got 4 hours sleep and did not get any lunch yesterday, and did not get any dinner last night until 1:30.

Senator METZENBAUM. Yes, but the young chairman has more strength and vigor than anybody in the Senate, so that is understandable.

The CHAIRMAN. I do not get tired. All right.

Now we are going to give 3 minutes apiece, that is all we can give, and then have questions, and we hope the statements can be brief and concise, so you can get in all you can in 3 minutes.

But we will put the rest in the record if you have any more, if you have a complete statement, and we hope the questions will not be duplicative, too, because there is no use to go over the same road.

The last few days, some of the members who are not here, they went over the same matter over and over again, and we will try to avoid that all we can this morning.

Now Representative Weiss, we are glad to have you with us and you may proceed.

TESTIMONY OF A PANEL CONSISTING OF REPRESENTATIVE TED WEISS, PRESIDENT OF AMERICANS FOR DEMOCRATIC ACTION, HOUSE OF REPRESENTATIVES, ELEANOR SMEAL, NATIONAL ORGANIZATION FOR WOMEN, WASHINGTON, DC, AND ALTHEA SIMMONS, NAACP, WASHINGTON, DC

Mr. WEISS. Thank you very much, Mr. Chairman. I want to express my appreciation to Mr. Metzenbaum for his kind words.

I have nothing but admiration for all of you, for your doggedness and perseverance in these hearings. But I must add that I do not understand why you have imposed this rigorous schedule of confirmation hearings on yourselves, on Justice Rehnquist, and on the American people.

I have heard many questions about why there is this pell-mell rush to complete in 2 or 3 days such an important matter, a matter affecting the Nation for perhaps decades and decades to come.

Mr. Chairman, members of the committee, I am testifying today both as a Member of Congress, and as president of Americans for Democratic Action.

Although ADA has sometimes had reservations about Supreme Court nominees, rarely have we opposed one. In fact the only nominations we have opposed, besides the nomination of William Rehnquist in 1971, were the nominations of Clement Haynsworth and G. Harold Carswell, nominations which the Senate itself rejected.

But we have found Justice Rehnquist's record so hostile to the rights of minority groups, so unconcerned about the abridgement of constitutional liberties protected under the Bill of Rights, and so polarizing and excessive in its doctrine, that we are compelled to oppose his elevation to the Nation's most important unelected office.

Mr. Chairman, we are convinced, after scrutinizing Justice Rehnquist's record on a broad range of issues, that his positions, as Chief Justice, will further divide this country between the privileged and the poor, between black and Hispanic and white, between men and women, between homosexual and heterosexual, between the majority and the minorities.

We feel that the role of Chief Justice must be filled by someone who will bring the country together, not polarize and embitter it.

We believe that it would be a calamitous mistake for the Senate to confirm as Chief Justice a man whose fundamental views are inimical to the Bill of Rights.

Mr. Chairman, together with the American people, I have had occasion, with the time that I could take away from my other duties, to watch as much of these hearings as I possibly could. And as a former prosecutor, I would characterize him as a "slippery witness." You could hardly recognize him as the person who has held the views that he has enunciated over the years, from the way in which he responded to questions.

I have had occasion to reread some of the testimony given in 1971 by the late distinguished civil rights leader Clarence Mitchell, and Mr. Joseph Rauh, and at that time, they pointed out that Mr. Justice Rehnquist, in 1964, opposed an ordinance allowing public accommodation access to all citizens.

He is the only one who testified in Phoenix, AZ, against that ordinance. He appeared, and excoriated members of the community who demonstrated for civil rights purposes in Phoenix, AZ.

He opposed the elimination of de facto segregation in the high schools of Phoenix, AZ. His voting rights challenges, which you will hear more about today, were established beyond any question of doubt.

All of these actions fit into a piece with the decisions that he has rendered as a Supreme Court Justice since then.

And it also fits in line with the revelations, which I found shocking and offensive, that he had participated in the purchase and sale of homes with restrictive covenants. For a member of the Department of Justice, for a U.S. Supreme Court Justice, to be so insensitive as to have that kind of restrictive clause in a sale of deed is just incomprehensible. I have spoken to any number of lawyers, who agree with me, that his testimony about his lack of knowledge of the restrictive covenants is just incredible.

And as one who has done some real estate work in the course of a prior career, I find it unbelieveable that his lawyers would not have brought to his attention, as a member of the Supreme Court, the presence of an offensive restrictive clause in his property deed.

So, Mr. Chairman, on the basis of his record, on the basis of his life-time conduct, on the basis of predictability as to what kind of Chief Justice he would be, the ADA urges the Senate to reject Justice Rehnquist's nomination for the position of Chief Justice of the Supreme Court.

[The statement follows:]

TESTIMONY OF CONGRESSMAN TED WEISS
PRESIDENT OF AMERICANS FOR DEMOCRATIC ACTION
ON THE NOMINATION OF WILLIAM REHNQUIST FOR CHIEF JUSTICE
JULY 30, 1986

Mr. Chairman, members of the Committee, I appreciate this opportunity to testify on the nomination of Justice William Rehnquist for Chief Justice of the Supreme Court. I speak today both as a member of Congress from the 17th district of New York, and as President of Americans for Democratic Action.

The ADA believes that the role of Chief Justice should be filled by a person who, whether liberal or conservative, has demonstrated a broad concern for protecting the constitutional rights of all citizens, including minority groups and those who hold minority opinions; and someone whose views on judicial matters are not divisive or ideologically extreme.

Although ADA has sometimes had reservations about Supreme Court nominees, rarely have we opposed one. In fact, the only nominations we opposed, other than William Rehnquist's in 1971, were those of Clement Haynsworth and G. Harrold Carswell, both of which were rejected by the Senate.

But we have found Justice Rehnquist so hostile to the rights of minority groups, so unconcerned about the abridgement of constitutional liberties protected under the Bill of Rights, and so polarizing and excessive in his doctrine, that we are compelled to oppose his elevation to the nation's most important unelected office.

The ADA came before this Committee in 1971 to express its concern about then-Assistant Attorney General Rehnquist's long standing antagonism towards the rights of black Americans to public accomodations, freedom of expression, education and voting. Today, after reviewing his 14 year record as an associate justice, we find our most troubling doubts about Justice Rehnquist have been confirmed. If anything, his antipathy towards civil liberties and minority groups has found dangerous new outlets.

Let me emphasize that we do not oppose Justice Rehnquist as a conservative: we have not opposed nominees who believe that in judicial matters, it is best to move conservatively and with special deference to precedent. Rather, we oppose Justice Rehnquist because his strident views are so extreme that they have left the Court's conservative voting bloc far behind.

His 47 lone dissents during his tenure on the Court illustrate the radical differences between his views and the views of his eight colleagues. For example, Justice Rehnquist was the sole dissenter in the Bob Jones University case, arguing that even though the university abided by an explicit code of racial discrimination, it should still qualify as a charitable organization, and hence receive federal tax benefits. Justice Rehnquist was impervious to the reasoning of his eight colleagues that status as a federally-recognized charitable organization was inconsistent with racial discrimination.

Another example of his adversarial views about minority groups is found in his dissent from the Court's decision to deny certiorari in Ratchford v. Gay Lib. By deciding not to hear the case, the Supreme Court let stand a lower court ruling that the University of Missouri could not deny an organization of gay men official recognition and access to campus facilities, on the basis of their homosexuality.

Justice Rehnquist's dissent was shocking for its vicious characterization of gay lifestyles and its casual dismissal of the First Amendment rights of the plaintiffs. After first depicting gay people as "akin to...those suffering from measles," Justice Rehnquist went on to argue that the group of gay students is not entitled to their First Amendment rights to peacefully assemble and hold public meetings, because he thought this might eventually lead to instances of sodomy, which was proscribed by Missouri state law.

In these and many other cases, Justice Rehnquist established himself on the fringe of jurisprudence, resolutely opposed to those seeking equal protection under the law. In Duren v. Missouri, he was the lone dissenter from a decision that a state may not automatically exempt women from jury duty, since it results in unfair trials for women; in Frontiero v. Richardson, he was the only dissenter from the Court's ruling that unreasonable discrimination on the basis of sex, in this instance for spousal benefits, is a violation of the Constitution; in Cruz v. Beto, he issued the sole dissent from the Court's conclusion that a state may not deny a prisoner reasonable opportunities to pursue his faith; in Richmond Newspapers v. Virginia, he was the lone dissenter from a decision that the press and the public have a right of access to criminal trials; and in Hathorn v. Lovorn, he issued the sole dissent from the Court's ruling that state courts are bound to enforce the Voting Rights Act.

These are but a few of many cases in which Justice Rehnquist displayed a belligerence towards civil liberties and equal protection that we feel must disqualify him for the position of Chief Justice.

I would like to make two final points about Justice Rehnquist. First, a close reading of his record on the Court shows that he is not a judicial conservative, as he likes to portray himself. He is rather, a judicial activist with an extreme right-wing agenda. He shows little inclination to move conservatively when an ideological issue is at stake. In fact, he seems ready to reverse much of the progress our nation has made over the last 25 years in the areas of equal protection, voting rights, and civil liberties.

Second, Justice Rehnquist is often said to apply a "majoritarian" analysis to his decisions, deferring whenever possible to the judgement of legislative bodies on contentious constitutional issues. I find this deference towards "elected bodies" distressing and anomalous, in part, because of Justice Rehnquist's 30 year record of hostility to voting rights.

But the more important objection is that this approach ignores the fundamental reason we have a Constitution, a Bill of Rights and a Supreme Court in the first place: to protect the rights of the minority from the excesses of a majority or of the government. A system of "justice" that defers to what is politically popular, rather than constitutionally justified, betrays both the Bill of Rights and the separation of powers.

As an organization dedicated to equal rights for all, the ADA is alarmed about the implications of having as Chief Justice a man who believes that the Bill of Rights does not extend to groups that are unpopular, or have no political clout.

Mr. Chairman, Americans for Democratic Action has scrutinized Justice Rehnquist's record on issues of equal protection, civil liberties, and voting rights. We believe his positions will further divide this country between the privileged and the poor, between black and Hispanic and white, between men and women, between homosexual and heterosexual, between the majority and the minorities. We feel that the role of Chief Justice must be filled by someone who will bring the country together, not polarize and embitter it. We believe it would be a calamitous mistake -- a mistake that time would not soon forgive -- to confirm as Chief Justice a man whose fundamental views are so inimical to the Bill of Rights.

For these reasons, Mr. Chairman, the ADA urges the Senate to reject Justice Rehnquist's nomination for the position of Chief Justice of the Supreme Court.

The CHAIRMAN. Thank you, Representative Weiss.

Miss Eleanor Smeal, glad to have you.

STATEMENT OF ELEANOR SMEAL

Ms. SMEAL. Thank you. I am Eleanor Smeal and I am the president of the National Organization for Women, and I have come before the committee today to oppose the appointment of Rehnquist as the Chief Justice of the United States.

I join with the Congressman's remarks, that this hurried procedure does not make it easy for us to present our case. It is almost impossible to state, in 3 minutes, why we object so strenuously.

We have not done this much before in the past. We have in fact chosen our times in objecting to appointments very carefully. This appointment, however, we must stand and object to, for he has taken in the past the most extreme positions on the Court, in imposing or limiting the rights of women, and of minority members of our society, and minority members on the basis of race, on the basis of sexual preference, on the basis of religion—a whole host of areas. NOW in fact finds his views on sex discrimination, and the rights of women, more than reactionary. We find them frightening.

We are submitting today detailed testimony on his viewpoints and on his records in the area of sex discrimination. It is comprehensive. It goes case after case after case.

Yesterday, when he was questioned very friendly by Senator Hatch, the impression was given that this is a man who believes in women's rights. We stay—we are here today to tell you, this is not the record of a person who is supporting women's rights, or minority rights. The record is replete with a trend, with a pattern, with a belief system that allows almost any form of discrimination to go forth.

And so I want to summarize—and I take my role here today as summarizing his record on sex discrimination—but I find his record on race discrimination, his record on civil liberties, and individual rights, in general, as reprehensible. I am just going to confine my remarks to the area of sex discrimination because of my role as president of the National Organization for Women.

Essentially, women have no equal rights amendment before the Constitution, so we are totally dependent upon the interpretation of the due process and the equal protection clauses of the 14th amendment, and on statutes.

Under the due process and equal protection laws, he essentially allows any standard. He calls it a rational standard of review, which says if you come up with any excuse, any reason for sex discrimination, it is OK, he will allow the standard.

Under the statutes, he has, in my opinion, flouted the will of Congress repeatedly, and narrowly interpreted those statutes that would guarantee a prohibition of sex discrimination, and in fact has made it so that you would interpret him that he has gutted those statutes. In the area of right to privacy, he repeatedly says there is none; he cannot read it into the Constitution.

He says he is for judicial restraint. I think it is judicial activism, when he, in fact, goes against the will of the majority of our country to eliminate the will and the desire to eliminate both sex discrimination and race discrimination.

This is an appointment that will go into the 21st century. Women and members of our society who are prejudiced—who, the Nation's will has been frequently one of discrimination against them deserve better. We deserve a chance in the Supreme Court.

I do not believe that Justice Rehnquist's record will be one that will extend women's rights or minority rights. I believe it will limit them, and severely limit them.

I can tell you that those of us dedicated to the fight for individual rights will look upon the votes of individual Senators on this as whether or not they are indeed for minority rights or women's rights.

A vote to confirm, in our belief, is a vote against women's rights, in the most fundamental sense.

[The statement follows:]

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Testimony of
Eleanor Cutri Smeal
President, National Organization for Women
Before the Senate Committee on the Judiciary
on the Nomination of William Rehnquist for Chief Justice
July 29, 1986

I am Eleanor Smeal, president of the National Organization for Women, and I come before the Committee today on behalf of the largest feminist organization in the United States to oppose the appointment of William H. Rehnquist as Chief Justice of the U.S. Supreme Court.

NOW's opposition to the elevation of Justice Rehnquist to Chief Justice stems from the simple, basic reason that he has taken the most extreme position on the Court in opposing and/or limiting the rights of women and of minority members of our society.

NOW, in fact, finds his views on sex discrimination and the rights of women more than reactionary. We find them frightening.

In taking these positions, Justice Rehnquist frequently has flouted the will of Congress and the previous holdings of the Supreme Court itself. If his views on the legal status of women were to become the dominant view of the Court, there is no doubt that a half century of hard-won gains for women would be undone by the Court, and the Congress would be faced with the task of enacting and re-enacting laws to prevent sex discrimination in our nation.

I want to state for the record, up front, that NOW's chief concerns have to do with Justice Rehnquist's judicial beliefs and ideology which we believe are out of step with the needs and expectations of Americans in the 1980s and that, therefore, make him unsuitable to lead the third branch of our government in the decades ahead.

And this is a crucial point for us. We are not talking about a limited term or terms of office. We are talking about an awareness that what Justice Rehnquist does if he is made Chief Justice will affect how our nation enters the 21st Century -- whether we go into the new century as a nation united or as a house divided. Whether we enter the 21st Century extending to women and minorities every opportunity and right of full citizenship or we enter dragging our heels in solving these 19th Century problems.

The members of the Committee, as well as each member of th United States Senate, must confront this reality before casting a vote for or against the apppointment of Justice Rehnquist to the position of Chief Justice.

It is not enough to judge him competent to read and to understand the law.

It is not enough to investigate his background and to declare him free of personal scandal.

And it certainly is not enough to dismiss the implications of his appointment by saying the President of United States has a right to put whomever he chooses in the position of Chief Justice.

The President has no such right, and never has. Not in 1986 and not in 1787 when the framers wrote the U.S. Constitution.

I ask this Committee to remember that the framers of the Constitution first considered giving the U.S. Senate the sole power to appoint justices of the Supreme Court and, only after additonal debate and discussion, did they decide to include the President in that process.

In making this concession, the framers envisioned the Senate to act as a full and equal partner in making the final decision as to whom would sit on the court and whom would lead it.

The reasons, we believe, are obvious.

Appointments to the U.S. Supreme Court are not political appointments. They are not cabinet positions answerable to the political philosophy of the man or woman who happens to occupy the Oval Office at any given time.

These are appointments that, barring death or total debilitation, survive elections to the Oval Office for literally decades in our history.

While it is unquestionably true that a President can have an awesome impact on the direction of the nation, that impact is limited to eight years.

The Chief Justice of the Supreme Court, on the other hand, can wield an awesome impact on the direction of the nation until the day he or she dies.

This is why the Senate has a duty to be a full and equal partner in the selection of the Chief Justice. This is why the Senate has a duty to look beyond legal competence and the possiblity of personal scandal.

You should know that Justice Rehnquist shares NOW's belief that the Senate should look beyond legal qualifications and personal considerations.

Writing for the Harvard Law Record of October 8, 1959, William H. Rehnquist had this to say concerning the appointment of Mr. Justice Whittaker to the Supreme Court and the lack of inquiry by the Senate into Justice Whittaker's political beliefs:

"The Supreme Court, in interpreting the Constitution, is the highest authority in the land, Nor is the law of the Constitution just 'there,' waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the Consitution which have been the most productive of judicial law-making -- the 'due process of law' and the 'equal protection of the law' clauses -- are about the vaguest and most general of any in the instrument. The Court, in Brown v. Board of Education, held in effect that the framers of the Fourteenth

Amendment left it to the Court to decide what 'due process' and 'equal protection' meant. Whether or not the framers thought this, it is sufficient for this discussion that the present court thinks the framers thought it.

"Given the state of things in March, 1957, what could have been more important in the Senate than Mr. Justice Whittaker's views on equal protection and due process? It is high time that those critical of the Court recognize with the late Charles Evans Hughes that for one hundred seventy-five years the Constitution has been what the judges say it is. If greater judicial restraint is desired, or a different interpretation of the phrases 'due process' or 'equal protection of the laws,' then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is to inquire of men on their way to the Supreme Court something of their views on these questions."

Mr. Chairperson, members of the committee, we agree with Justice Rehnquist that it is crucial for the Senate to inquire into the views of men, and we of course would add women, in regard to due process and equal protection of the laws. We would include the need to inquire into the views of Supreme Court nominees in regard to all areas of the law vis-a-vis sex discrimination and other kinds of discrimination as well.

We have waged a long and difficult struggle in our nation to overcome the effects of past legalized discrimination on enormous numbers of our citizens. The struggle is not yet over.

But we have made great strides, and we have paid a great price for these gains. We fought the only war ever fought on American soil to shed ourselves of the evil of human slavery and to settle the question of state sovereignty.

We have experienced great social upheavals and great social and political movements to move forward the claims of full equality under the law for the overwhelming majority of our citizens -- claims that over the past half century have taken firm root in the consciousness and the law of America.

Now, in 1986, as we struggle to continue that progress into the next century, it is not time to put someone in the critical role of Chief Justice of the Supreme Court whose vision is of another century, a time past when women and blacks were regarded as little more than chattel and who were routinely treated as persons whose well-being was dependent on the benevolence of white men.

Mr. Chairperson, members of the Committee, the National Organization for Women believes that our nation has come to terms with our past, that we as a nation have made a commitment not to revive nor re-live the injustices of the one hundred seventy-five years to which Justice Rehnquist referred in the Harvard Law Record in 1959.

We know the American people have no desire to re-live the past, or to re-learn the lessons of the darkest chapters in our history as a nation. In fact, just this past week an opinion poll was released in which 63 percent of Americans said judges should be committed to equal rights for women and minorities.

I don't think I need to point out to this committee that if that opinion poll were translated into electoral terms, the result would be considered a landslide in favor of equal rights for women and minorities.

At the same time, the National Organization for Women submits that Justice Rehnquist is not committed to equal rights for women and minorities and, in fact, appears dedicated to thwarting equal rights at every opportunity.

I. Constitutional Law: Equal Protection and Due Process

In the crucial constitutional areas of due process and equal protection under the law, which are guaranteed to us by the 14th Amendment to the U.S. Constitution, Justice Rehnquist has consistently opposed the review of sex-based classifications with any measurable level of scrutiny. He would uphold sex-discrimination as long as it was "rational." In real terms, this means that he would uphold sex discrimination whenever and wherever a legislator or other government official could come up with a traditional generalization about "all women." He would support sex discrimination on the grounds of administrative convenience alone. Would the U.S. Senate confirm a Chief Justice of the Supreme Court who supported racial or ethnic classifications on the grounds of such thinly disguised prejudice?

A review of the actual words used by Justice Rehnquist is essential to see the extent of his endorsement of sex discrimination. In one of his earliest cases on the Supreme Court, Frontiero v. Richardson, 411 U.S. 677 (1973), which prohibited sex discrimination in the granting of family benefits to military personnel, Justice Rehnquist dissented. He wanted to permit the military to allow male soldiers to claim wives as dependents automatically, but to deny such benefits to female soldiers. His reasoning was simple: administrative convenience justifies sex discrimination.

In Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974), a case that prohibited mandatory leave for pregnant teachers, Justice Rehnquist again dissented. His explanation was that legislators must be permitted to "draw a general line ... short of the delivery room" and he did not wish to interfere with their judgment. His opinion was that a pregnant woman losing her job had no basis for complaint.

In Craig v. Boren, 429 U.S. 190 (1976), a landmark case which first articulated the intermediate level of scrutiny for sex discrimination (an uncertain and rather flimsy level of protection on which women must rely in the absence of the Equal Rights Amendment to the U.S. Constitution), Justice Rehnquist said, in dissent, that sex discrimination should be reviewed with a rational basis test. This case involved a state statute which demanded a higher age requirement for men to purchase beer than for women to purchase it. The Justice made the astonishing claim that, since the case was filed by a man, there was no need for special attention to the sex-based classification. His reasoning was that historically men have not been discriminated against, hence there is no need to review the classification. His glib words ignored the reality with which we are all too familiar: any sex classification ultimately stereotypes, hurts and discriminates against women.

In Califano v. Goldfarb, 430 U.S. 199 (1977), a case that equalized the survivors' benefits of widows and widowers, Justice Rehnquist also dissented, again on the grounds of administrative convenience. Three years later, he dissented in Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980), a case that equalized workers' compensation death benefits, and expressed his unwillingness to follow Goldfarb.

Thus, we are forced to conclude that when it comes to women's rights, Justice Rehnquist is clearly willing to ignore the usual deference afforded judicial precedent.

In Michael M. v. Superior Court of Sonoma County, 450 U.S. 437 (1981), Justice Rehnquist, writing for the majority, once again reaffirmed the principle of sex discrimination, by finding that men and women can be treated differently under the law because women can become pregnant. This case represents a particularly dangerous kind of logic in light of Gilbert v. General Electric Co. On the one hand, Justice Rehnquist does not believe that pregnancy discrimination is discrimination on the basis of sex. On the other hand, he permits classifications on the basis of sex because women can and do become pregnant. His logic places women in an intolerable Catch 22: on the one hand, they are victims of legal discrimination because of pregnancy, and, on the other hand, pregnancy discrimination is not a basis for legal relief.

We are aware that Justice Rehnquist has been praised for his skill in legal craftsmanship and for his ability to state his conclusions with elegance. We believe, on the other hand, that his verbal skills merely serve to obfuscate his inconsistent reasoning. For example, in Rostker v. Goldberg, 453 U.S. 57 (1981), Justice Rehnquist justified one form of sex discrimination by reliance on neither logic nor law. Instead, he permitted sex discrimination in one aspect of government simply because sex discrimination already existed elsewhere.

In Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), a case that held invalid a state policy excluding men from nursing school, Justice Rehnquist again dissented. He maintained that the "sexual segregation of students" has a long tradition and many benefits, and that the equal protection standard generally applicable to sex discrimination is inappropriate to the review of such schools. He conveniently ignored the fact that separate schools for women were established not for the sake of the "diversity" in education that he praised, but, instead, because women were barred from the institutions of higher learning made available to men. In praising Wellesley and Barnard as parallel options to Harvard and Yale, he failed to mention that the women's colleges were established to provide women with an opportunity not otherwise available due to the prevailing norms of sex discrimination. Justice Rehnquist further stated that sex segregation in education was not as invidious as racial segregation, ignoring the harmful stereotypes perpetuated by sex segregation in education.

Even when recognizing that a woman's right to equal protection has been violated, Justice Rehnquist would deny them a remedy. In Kirchberg v. Feenstra, 450 U.S. 455 (1981), a case that invalidated a law permitting a husband to dispose of joint property without the wife's consent, Justice Rehnquist wanted to apply the Court's holding only prospectively.

II. Employment Discrimination

In the area of employment discrimination, Justice Rehnquist has argued for the gutting of federal laws passed by Congress to remedy the pervasive discrimination suffered by women. The two principal statutes involved are the Equal Pay Act and Title VII of the Civil Rights Act of 1964.

I will first address a particularly harmful aspect of employment law, discrimination on the basis of pregnancy, and then discuss other important employment discrimination cases where Justice Rehnquist has shown himself to be the enemy of equal employment opportunity for women.

In spite of the clear intent of Congress to eradicate sex discrimination in employment, Justice Rehnquist has consistently striven to justify such discrimination wherever possible.

A. Pregnancy Discrimination

Justice Rehnquist's principal approach to pregnancy has been to deny that there is any relationship between discrimination on the basis of pregnancy and discrimination on the basis of sex. He views the world as consisting of three groups of people: men, women, and "pregnant persons." He conveniently ignores the fact that pregnant persons are always women. In so doing, he has repeatedly ignored Congressional intent.

In Gilbert v. General Electric Co., 429 U.S. 125 (1976), Justice Rehnquist, writing for the majority, held that pregnancy-related discrimination is not sex discrimination covered by Title VII of the 1964 civil Rights Act. He reasoned that, although only women became pregnant, the exclusion of pregnancy from a benefits package did not discriminate against women. This cruel distortion of the obvious realities of human life required Congress to pass the Pregnancy Discrimination Amendment to Title VII, specifying that, in fact, discrimination on the basis of pregnancy is discrimination on the basis of sex.

We submit that Justice Rehnquist's illogical reasoning process, if applied to other laws, will make it necessary for Congress to continually pass new laws in order to remedy obvious distortions of Congressional intent.

Even acknowledging that certain forms of pregnancy-related discrimination may affect women and not men, Justice Rehnquist has limited the scope of recovery and remedy.

In Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), (a case that arose before the Pregnancy Discrimination Act), an employee who had been required to take a formal leave of absence during her pregnancy did not receive sick pay and lost all accumulated job seniority. Justice Rehnquist, writing for the majority, found the loss of seniority rights to be discriminatory, because the employer "has imposed on women a substantial burden that men need not suffer."

He distinguished this case from Gilbert, supra, on the grounds that denial of pregnancy health benefits was simply a failure to pay greater economic benefits to women than to men. When it came to the denial of sick pay, Justice Rehnquist found it to be an "extra benefit," not available to men, and therfore not an entitlement of women employees.

He remanded Nashville Gas Co. v. Satty with narrow instructions rendering recovery less likely.

We must also point out that when confronted with blatant discrimination in violation of the Pregnancy Discrimination Amendment to Title VII, as in Newport News Shipbuilding v. EEOC, 462 U.S. 669 (1983), Justice Rehnquist strained to avoid the remedial scope of the law and the clear intent of Congress.

In that case, an employer provided insurance coverage for the pregnancy-related conditions of female employees, but did not fully provide such coverage to the spouses of male employees. The majority of the Supreme Court found that this violated the law since the exclusion of pregnancy from a health plan was gender-based discrimination on its face.

Justice Rehnquist argued to the contrary, claiming that the law did not apply to all employment-related pregnancy issues, but only to pregnant female employees. Thus, even when faced with a law passed to overcome his resistance to the obvious fact that pregnancy-related discrimination is sex discrimination, Justice Rehnquist twists logic in an effort to render the law less helpful to the victims of discrimination.

B. Justifications for Employment Discrimination

In case after case, Justice Rehnquist has tried to avoid the Congressional mandate to eradicate sex discrimination. He has consistently justified various forms of sex discrimination under the guise of "strict construction" of the laws. We believe, in fact, he has tried to rewrite laws.

In Corning Glass Works v. Brennan, 417 U.S. 188 (1974), the Court relied on the Equal Pay Act to find that Corning had discriminated against women by failing to cure its sex-based job assignment and wage system. Justice Rehnquist dissented, on the spurious grounds that the company's dual-salary system, which prohibited women from holding the more lucrative night-time jobs, was based "on a factor other than sex."

In Dothard v. Rawlinson, 433 U.S. 321 (1977), a Title VII case involving height and weight requirements for prison guards as well as an outright prohibition against female guards in "contact positions," Justice Rehnquist argued for upholding the sex-discriminatory height and weight requirements. He observed that a theory not advanced by the defendants could have been used to justify the discrimination. His theory was that a requirement that an employee have a sufficient "appearance of strength," rather than actual strength, could have been used to support the restrictions. Thus, he would support an employer's stereotypic preference for a culturally accepted norm of strength -- that is, a tall man.

In Washington v. Gunther, 452 U.S. 161 (1981), the Supreme Court held that Title VII provides relief for sex-based wage discrimination even though the male and female jobs involved are not identical. The Court permitted the claim of female guards who complained of intentional wage discrimination to go forward, even though the male job to which they compared their wages was not entirely identical to their jobs.

Justice Rehnquist, relying on the more narrow language of the Equal Pay Act, argued that Title VII should be limited to a review of differences, if any, in wages paid to persons holding identical jobs. His approach would preclude recovery for millions of women working in the sex-segregated workforce.

According to Rehnquist, women who perform work comparable to (as oppose to equal to) that of higher paid males have no cause of action, even if the wage differential is intentionally sex-based. Rehnquist therefore would hold that Title VII does not even prohibit all intentional sex-based employment discrimination.

The Committee should know that Justice Rehnquist's approach to wage discrimination would perpetuate lower pay for women once they retire. In Los Angeles v. Manhart, 435 U.S. 702 (1978), a Title VII case that prohibited the use of gender-based actuarial tables as a basis for requiring greater pension contributions from women employees, Justice Rehnquist joined Chief Justice Burger in arguing for the validity of such discrimination.

We would also ask the Committee to look closely at Justice Rehnquist's clear animosity toward the concept of affirmative action as a remedy for discrimination not only in employment, but in education and other areas as well.

In two of the three major affirmative action decisions handed down by the Court in the term just ended, Justice Rehnquist dissented in those cases in which the Court reaffirmed the legality of affirmative action as a remedy for past discrimination. In the cases of Local No. 93, International Association of Firefighters, AFL-CIO v. City of Cleveland and Local 28 of the Sheet Metal Workers International Association v. Equal Employment Opportunity Commission, the majority flatly refused to uphold the claim that affirmative action is reverse discrimination against whites.

In the third affirmative action case in which Justice Rehnquist was in the majority, the Court struck down a race conscious lay-off plan for teachers in Wygant v. Jackson Board of Education.

Finally, in one of the few sex discrimination cases in which Justice Rehnquist decided for women, Meritor Savings Bank v. Vinson, Justice Rehnquist demonstrated that, even in cases of blatant discrimination, he will misinterpret Congressional intent so as to limit the remedial strength of the civil rights laws. In this case, the issue was whether or not sexual harassment of an employee constitutes sex discrimination. The Supreme Court concluded the obvious: if an employee is sexually harassed at her place of work, she is suffering from sex discrimination that is prohibited by Title VII. However, Justice Rehnquist, departing from the long-standing policy of the EEOC, concluded that the employer is not necessarily liable for sexual harassment and that the employee must prove the employer's liability in Court. No such limitation on the remedial purpose of Title VII has been applied in other types of prohibited discrimination. In other cases, the employer is automatically liable for the discrimination. However, when it comes to one of the most pervasive, insidious and harmful form of discrimination suffered by women, extra procedural hurdles are viewed as appropriate by Justice Rehnquist.

III. Reproductive Rights

In the area of reproductive rights, we cannot emphasize enough the recognition that, if given the opportunity, Justice Rehnquist will lead the Court to a reversal of the Roe v. Wade decision which made abortion safe and legal for women in our nation.

Justice Rehnquist clearly does not recognize abortion as a fundamental right of women, and his entire history on the Supreme Court supports this contention.

He was one of the two dissenters in the original Roe v. Wade and Doe v. Bolton cases which were decided in 1973, and since that time he has consistently voted with the minority in cases involving the right of abortion:

Belotti v. Baird, 1974; Planned Parenthood of Missouri v. Danforth, 1976; Colautti v. Franklin, 1979; Akron Center for Reproductive Health, Inc. v. City of Akron,1983; Planned Parenthood Association of Kansas City v. Ashcroft, 1983; Simopoulos v. Virginia, 1983, Thornburgh v. American College of Obstetricians and Gynecologists, 1986.

His dissents in the early Roe and Doe cases acknowledged that the right to decide whether or not to have an abortion is a liberty interest protected by the Fourteenth Amendment, but one that can be abridged if the restriction bears a "rational" relation to a valid state objective. In other words, Justice Rehnquist believes the state's interest has primacy over the right of a woman to make a basic, obviously private decision which has a fundamental impact on her life, health and her economic well-being.

In the later cases, Justice Rehnquist consistently signed onto dissents which would have upheld various restrictions on access to abortion, such as: hospitalization, spousal and parental consent, informed consent, 24-hour waiting periods and requirements that physicians take care to preserve fetal health and life.

But, in the Thornburgh case, he was one of only two justices to argue that Roe v. Wade should actually be overturned, in spite of the fact that the state defending the abortion statute at issue did not request reconsideration of the Roe decision.

We would remind this Committee and all members of the U.S. Senate that prior to 1973 and the Roe v. Wade decision, illegal abortion was a serious public health hazard in our nation.

It was estimated by the President's Commission on Law Enforcement and Administration of Justice in 1967 that an estimated one million illegal abortions were performed each year in this country.

While estimates of annual deaths caused by illegal abortions were difficult to obtain due to the clandestine nature of such abortions, such estimates ran as high as 5,000 to 10,000 deaths per year.

By contrast, where legal abortions were performed by medical practitioners during this same period, there were only three deaths per 100,000 abortions (which would translate into 10 per 1 million). At the same time, it must be pointed out that the maternal mortality rate during this period was an average of 28 deaths per 100,000 live births.

The Roe v. Wade decision legalizing abortion virtually eliminated the public health hazard caused by illegal abortion. In fact, the Centers for Disease Control report that the risk of dying from childbirth is 13 times greater than that of abortion.

Furthermore, it has been clear since the Roe v. Wade ruling that a majority of Americans support a woman's right to choose abortion despite beliefs to the contrary espoused by Justice Rehnquist and the man who would make him Chief Justice, President Reagan.

Public opinion polls on this question have consistently supported the right of women to choose abortion for more than a decade. This Committee should know that in the same Peter Hart and Associates poll that showed 63 percent of Americans holding the opinion that judges should be committed to equal rights for women and minorities, 74 percent of those polled said they support the Court's 1973 ruling that legalized abortion -- the highest level of support in history.

For NOW, there is no issue that points out more starkly our belief that Justice Rehnquist is, indeed, out of step with the needs and expectations of Americans in the 1980s, particularly

American women who constitute a majority of the population.

Now, this Committee knows that the Roe v.Wade decision is grounded in the right to privacy which the Supreme Court over time has derived from the concept of liberty guaranteed by the first section of the Fourteenth Amendment. The Court also has found the right to privacy to have roots in the First, Fourth, Fifth and Ninth Amendments, as well as in the penumbras of the Bill of Rights.

What this Committee may not know is that Justice Rehnquist rejects the constitutional concept of the right to privacy which the highest Court of this land has recognized for over half a century.

Justice Rehnquist has written and has stated on many occasions that there is no right to privacy in the U.S. Constitution, because he can't find those specific words written there.

NOW finds this especially threatening, not only for abortion rights, but for the right to practice birth control and to engage in private, consensual sexual acts.

We would submit that Justice Rehnquist's concept of the Constitution is dangerously simplistic and reactionary. He rejects out of hand the notion of implied rights and views the Constitution as a static document that is incapable of being adapted to changing times and social progress.

For Justice Rehnquist, if the Constitution doesn't specifically and explicitly grant a right to the individual, then the individual is entirely at the mercy of shifting political majorities at all levels of government.

We would ask the Committee to consider two other dissents by Justice Rehnquist which have nothing to do with either abortion or the use of birth control, both of which issues are grounded in the right to privacy.

In 1978, Justice Rehnquist dissented from the Court majority in Zablocki v. Redhail, a case in which a Wisconsin statute was struck down that had required a non-custodial parent with support obligations to minor children to obtain court permission before re-marrying.

He rejected the view that marriage was a "fundamental right" and argued that the Wisconsin statute was a "permissible exercise of the state's power to regulate family life."

In yet another case, Moore v. City of East Cleveland, in which the Court struck down zoning laws which prohibited extended family members from living together, Justice Rehnquist joined a dissenting opinion that said the right of an extended family to share a home does not rise to the level of a fundamental interest entitled to protection under the Constitution.

We ask this Committee if anyone of you really believes the state should have the power to regulate when and if a person gets married, and when and if family members should be allowed to live together?

The National Organization for Women does not believe the citizens of this nation are willing to give up their right to privacy because Justice Rehnquist has decreed that it doesn't exist.

Nor do we believe the people of this nation are willing to turn over to the state the power to interfere with personal decisions on marriage and child bearing.

Finally, NOW does not believe that the people of this nation who continue to suffer societal discrimination because of the illogical barriers of sex, race, color, physical disability or age are willing to give up our hard-won gains because Justice Rehnquist believes the courts are not the appropriate branch of government to protect those rights and liberties.

Historically in our nation, the courts have been the one place where those who suffer from discrimination could turn for protection from oppressive government responding to the popular prejudices of any given time.

Justice Rehnquist has made it clear in both his legal opinions and in his writings for various law journals that he believes the Constitution was written to give the state power over the individual and not to protect the individual from the powers of the state. Furthermore, it is his belief that the Bill of Rights and additional amendments to the Constitution that have been added over time and which speak to individual liberties are to be read and applied literally, without interpretation by the courts.

Given this notion of a "static" document which is to be applied only to the narrow, specific situation that triggered the passage of any particular amendment, Justice Rehnquist has stated on several occasions that, if given the opportunity, he would limit access to the courts by individuals who believe their rights are being violated by the state.

This belief, in fact, was the ground on which he based his opposition to Brown v. Board of Education in the now-infamous 1953 memo to the late Justice Robert Jackson in which he said, "... it is about time the Court faced the fact that white people in the South don't like colored people."

While NOW's role here today is not to present to the Committee Justice Rehnquist's record of opposition to improving the legal status of racial minorities and other minorities in America, we would be remiss in our duty if we didn't point out our grave concerns about this record.

Since we are confident that others will testify extensively to this record, let us just say for the record that we are aware that Justice Rehnquist defended racial segregation in our nation as a lawyer from 1953 through 1967 -- from the period in which he served as law clerk to Justice Jackson through the period he was in private practice in Phoenix, Arizona.

We would remind the Committee that during this 14-year period, Justice Rehnquist made the following comments in regard to racial segregation in our nation:

1953: The Supreme Court should not "thwart public opinion except in extreme cases" and segregation in the schools is "not one of those extreme cases which commands intervention."

To the argument that the majority may not deprive a minority of its Constitutional rights, he argued that "in the long run it is the majority who will determine what the Constitutional rights of the minority are."

1964: When opposing a Phoenix ordinance designed to prevent racial discrimination in public accomodations, he defined the issue as "whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places at all."

1967: When opposing a proposal by the Phoenix Superintendent of Schools for a voluntary exchange of students to reduce school segregation, he argued taht "we are no more dedicated to an integrated society than we are to a segregated society" in America.

There are those, including Justice Rehnquist himself, who have insisted that his attitude on racial segregation has changed since the time he left Phoenix.

We would submit, however, that his lone dissent in Bob Jones University v. The United States, written a scant three years ago, amply demonstrates that for all his rhetoric to the contrary, Justice Rehnquist is more than willing to continue defending situations in which institutions in this country wish to practice racial segregation.

In yet another area of law dealing with individual rights and liberties, NOW is aware that when Justice Rehnquist served in the U.S. Department of Justice when it was headed by former Attorney General John Mitchell, he assumed the controversial and questionable role of defending the White House's so-called "inherent right" to use wiretaps against those it deemed subversive.

And we ask this Committee to remember that a question of ethics, if not an actual conflict of interest, arises in his involvement in 1972 in Laird v. Tatum in which the Court held, in a 5-4 decision, that the government could spy on peaceful civil rights and civil liberties meetings and that the persons who were subject to the spying could not bring any First Amendment challenges.

Justice Rehnquist cast what was, in effect, the tie-breaking vote even though as head of the Department of Justice's Office of Legal Counsel he had actively defended the litigated surveillance. We do not consider his explanation sufficient that he did not recuse himself from voting on the case out of concern that the court not be faced with a possible even split in the vote.

Mr. Chairperson, members of the Committee, the National Organization for Women is convinced that this Committee could do nothing more destructive of our nations' future than to place an ideological extremist in the position of Chief Justice of the U.S. Supreme Court.

We reject the notion being pressed in some quarters that the job of Chief Justice is largely symbolic, and that this person is really just one of nine votes on the Court.

This argument just doesn't hold water. The Chief Justice has enormous influence on the Court. He or she arranges the docket, schedules cases, assigns oppinions to be written, and controls the federal court system. In addition, the Chief Justice has extraordinary power to write majority opinions himself or herself, and the Chief Justice has the ability to exert pressure on other Justices which no Associate Justice can match.

At the same time, we reject the notion that the nomination of Justice Rehnquist as Chief Justice is a nod toward judicial restraint.

With Justice Rehnquist's stated belief that the right to privacy doesn't exist under our Constitution, it is not difficult for one to conclude that decades of precedents in this area of the law are at risk with him leading the Court.

With Justice Rehnquist's stated belief that, except for those individual rights and liberties specifically delineated in the Constitution, all other rights and liberties are at the mercy of shifting political majorities, it is not difficult for one to conclude that our national policies committed to the elimination of sex and racial discrimination are at risk with him leading the

Court.

And with Justice Rehnquist's stated beliefs that the Constitution is an inflexible document that doesn't, nor was ever intended to, anticipate the needs of a changing society, it is not difficult for one to conclude that we as a nation face the very real possibility of a re-interpretation of our Constitution with him leading the Court.

NOW would submit that these possibilities couldn't be farther removed from judicial restraint; that they are, in fact, the epitome of judicial activism.

The National Organization for Women petitions this Committee and the body it represents, the U.S. Senate, to reject the nomination of Justice Rehnquist to become Chief Justice of the Supreme Court.

We further petition this Committee and the U.S. Senate to insist that any further nominee presented by the President be a person who is truly dedicated to the pursuit of liberty and justice for all.

Thank you very much.

The CHAIRMAN. Thank you, Miss Smeal.

Miss Althea T.L. Simmons.

STATEMENT OF ALTHEA T.L. SIMMONS

Ms. SIMMONS. Mr. Chairman, and members of the committee, I am Althea T. L. Simmons, director of the NAACP's Washington Bureau.

I am appearing on behalf of our half million members in 2,100 branches across the country. We appear in opposition to the nomination of Mr. Rehnquist as Chief Justice.

Our opposition today is a reaffirmation of what the NAACP said almost 15 years ago, when this committee had before it his nomination to the Supreme Court.

We said at that time, we did not believe Mr. Rehnquist could mete out to black Americans equal justice under law. Our response was no in 1971 and also in 1986. It is our opinion that Mr. Justice Rehnquist has not changed his position since he was in Arizona. As a matter of fact, he has fine-tuned his opposition to civil rights and racial issues.

From 1961 to 1965, I was field director for NAACP in Arizona, and during 1964, I was our national director of voter registration education get out the vote campaign.

I recall from my files, that complaints came in about what happened in Arizona. On Sunday, I talked with former Senator Clovis Campbell, to see if he could recall what he had stated at that time. Mr. Campbell said to me: "Justice Rehnquist said to me in 1964, 'I am opposed to all civil rights laws.' " I also spoke with Rev. G. Benjamin Brooks, whose statement we put in the record last time. Reverend Brooks reaffirmed what he had said at that time.

I spoke to Mr. Jordan Harris. The same thing occurred. One of the things that we have looked at is a whole line of cases with reference to race, and we have found out that not only has he been in opposition to the Voting Rights Act, and some of its extensions, but we are concerned mostly about the Jackson memorandum.

I guess I would have to say, Mr. Chairman, and members of the committee, any time you mention *Plessy* v. *Ferguson,* red flags go up for black Americans.

We believe, as a matter of fact, that that was a signal point in this Nation's history. We are concerned about how the Justice has echoed legal—the principal of causation, in a manner where he does not find violation of the equal protection clause, in *Milliken* v. *Bradley,* the school desegregation case. Also, in the *Dayton* case. The *Pasadena* case. In employment cases. You could take *Stotts,* the *Firefighters* case in Cleveland.

In cases where they were challenging Federal legislation that provided for minority set-asides, in death penalty cases, and among others, the exact legal jargon relief.

However, the concept of causation is designable to either argue that actual harm was not caused by the alleged wrongful conduct, or, in the alternative, that the conduct was wrongful but the complaining party was not harmed by it. We are concerned, about his opinion in *Batson* v. *Kentucky.*

We are also concerned about how he has attempted to narrow the 14th amendment to the Constitution. Justice Rehnquist strictly reads the language in title VII to forbid any discrimination, even race-conscious affirmative action plans, designed to ensure equal employment opportunity.

In construing title VII, he has scrutinized the facts of a case for specific discriminatory conduct within the meaning of the act as in *Stotts, Sheet Metal Workers* et cetera.

He also looks closely to see if the legislated or judicial remedy narrowly responds to that conduct. Even when he appears to express an opinion in support of discriminatory conduct against a minority protected by Federal legislation he stops short of finding a statutory violation in the facts.

The NAACP has looked at his race cases and we normally do not submit lengthy testimony, however, this time, Mr. Chairman, our testimony is 36 pages, because we went down a whole line of cases to show that he has not changed his position articulated in Arizona, but that he is opposed to civil rights.

And we are concerned about him being on the bench as a leader and a shaper of the Court, because we realize that he will have a most important position there. You will recall, very recently, that Chief Justice Burger reminded us of the 200th birthday of the signing of the Constitution. I think we should recall that another Chief Justice wrote the majority opinion in one of the most infamous cases in history. I speak of the *Dred Scott* decision.

And you will also recall what the Chief Justice held in that decision that the Constitution was not meant for blacks be they free or slave, and that the black man had no rights that a white man was bound to respect. That decision was so out of touch with the mainstream of political thought, even during a period of slavery, that it hastened the war between the States, and stood as a blot on the Court's history.

Much has been said about the brilliance of Mr. Justice Rehnquist, and the fact that he was first in his law school class at a prestigious institution.

We do not refute that. We remind the committee that even though a person may be a genius, if that person is devoid of compassion, it distorts reality and cripples one's objectivity.

We also believe that some attention should be given to judicial philosophy. We think that is important. As a matter of fact, Mr. Justice Rehnquist said himself it was important.

And we would urge this committee, in your consideration of this nominee, to take a look at the nominee's actions in Arizona in the 1960's, look at his decisions, and then see if he is the person who could best bring about the kind of equality in this Nation that all persons are entitled to. The NAACP opposes his nomination.

The **Chairman**. Thank you, Miss Simmons.

[The statement follows:]

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TESTIMONY

OF

ALTHEA T. L. SIMMONS

DIRECTOR, WASHINGTON BUREAU

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

BEFORE THE

SENATE COMMITTEE ON THE JUDICIARY

ON THE

NOMINATION OF WILLIAM H. REHNQUIST
FOR

CHIEF JUSTICE, UNITED STATES SUPREME COURT

JULY 29, 1986

Room 106, Senate Dirksen Building

Mr. Chairman, amd members of the Senate Judiciary Committee, I am Althea T. L. Simmons, Director of the Washington Bureau of the National Association for the Advancement of Colored People. I am appearing on behalf of the NAACP's one-half million members in our 2100 branches in the 50 states and the District of Columbia in opposition to the nomination of Mr. William Rehnquist as Chief Justice of the United States Supreme Court.

Our opposition today to Mr. Rehnquist's nomination is a reaffirmation of a position the NAACP took almost 15 years ago before this Committee which was reaffirmed as late as July 3, 1986 at the NAACP's 77th Annual National Convention.

Many persons refuse to predict what a lawyer will do once he/she leaves the political arena and begins a lifetime judicial appointment. The pundits are quick to point out that many individuals, once confirmed as judges, grow in stature, sometimes modifying views they held before gaining a seat on the bench. The NAACP considered this almost a decade and a half ago and felt comfortable at that time, as we do now, in raising the question as to whether Mr. Rehnquist could mete out, to black Americans, equal justice under law. Our response was "no" in 1971 and it is "no" in 1986. This was no idle guess in 1971. In the last few weeks, the NAACP has revisited the Rehnquist record. It is our considered opinion that he has not changed his position rather, the years have more finely tuned his positions on civil rights and racial issues.

Today, the NAACP states for the record that it is our considered opinion that Mr. Rehnquist is out of step with the nation in his interpretation and theories relating to equal justice under the Constitution and laws of the land; hence, we urge the Committee to reject his nomination.

Mr. Chairman, we believe it is appropriate to raise once again some of the issues raised during Mr. Rehnquist's first confirmation hearing. You will recall, from the record, that the Judiciary Committee Report in 1971 summarily dismissed, as "wholly unsubstantiated", the charges by our Maricopa County branch officials and others that Mr. Rehnquist was involved in voter harassment during the 1964 election. Our urgent requests to have Mr. Rehnquist return to the Senate Judiciary Committee for another day of hearings went unheeded. It is the position of the NAACP that, in light of the fact that the nominee's account of his role in the so-called [Phoenix] "Ballot Security" activities during that election was and is challenged by notarized affidavits of witnesses, which we provided in 1971 and again today, together with the recent challenges by three additional witnesses named in the July 25, 1986 edition of the Washington Post, the Committee should probe the nominee regarding his alleged actions.

We do not believe that this is inappropriate given the fact that he is being considered for the position of Chief Justice of the nation's high court which carries with it the power to lead and shape the court for years to come.

OPPOSITION TO CIVIL RIGHTS

In 1964, Mr. Rehnquist is quoted as saying:

"I am opposed to all civil rights laws"

This statement was confirmed and reiterated to me on July 27, 1986 by its originator, former Arizona State Senator Cloves Campbell, the publisher of the Arizona Informant. Mr. Campbell stated that he approached Mr. Rehnquist after a meeting of the Phoenix City Council meeting where Mr. Rehnquist testified and asked why he was opposed to the public accommodations ordinance. Mr. Rehnquist's position on public accommodations was reaffirmed through his letter to the Editor which appeared in the June 21, 1964 issue of the Arizona Republic, a scant two (2) days after the U. S. Congress passed the Civil Rights Act of 1964 by a 73 to 27 vote.

Mr. Rehnquist's stated opposition to "all civil rights laws" can be seen in his writings both on and off the bench.

A. Civil Rights - Voting Rights for Minorities

When my predecessor, Clarence M. Mitchell, Jr., appeared before this Committee urging the rejection of the Rehnquist nomination on the grounds that his record showed:

> "...a consistent pattern of opposition to the rights of black Americans in areas of public accommodations, freedom of expression, education and voting."

Mr. Mitchell told the Committee:

> "...these taken singly or together, raise grave doubts about whether he could mete out to the black citizens of America equal justice under law.

He also pointed out that:

> "there is only one area of civil rights legislation where conservatives, liberals and even some of the deep South members of the Senate and House could reach agreement. That is the right to vote."

Mr. Rehnquist, before his confirmation in 1971, attempted to bar voters from casting their ballots. He was personally present in some precincts when unconscionable attempts were made to prevent elderly and/or timid black citizens from voting. His alleged purpose for being there was to halt abuses by others. In contradiction, there were witnesses who signed sworn affidavits alleging that it was Mr. Rehnquist, himself, who was interfering with citizens' right to vote.

Black citizens alleged that Mr. Rehnquist harassed them at the polls in 1964; that he attempted to make them read portions of the Constitution and refused to let them vote unless they were able to comply with his demand.

The NAACP calls to the Committee's attention the allegations, by the NAACP's leadership in Phoenix and others, that Mr. Rehnquist took an active part in the so-called "Ballot Security " program. The Reverend George Benjamin Brooks, former President of the Maricopa County Branch of the NAACP testified:

> "...as chief of the Republican challengers he [Rehnquist] planned and executed the strategy designed to reduce the number of poor black and poor Mexican-American voters in the crucial 1964 National elections. He trained young, white lawyers and others to invade each black or predominantly black precinct in Phoenix on election day. The people were standing in long lines early in the morning as many were on their way to work. These young, white lawyers had printed cards on which were printed portions of the Constitution and demanded that the challenged voters read from them. It slowed down the voting so much that many voters complained and left. In that election I was the Inspector for the Election Board of Julian Precinct, a predominantly black precinct in South Phoenix. It became so bad that I threatened to call the police to have the challenger and poll watcher arrested for interfering with poor people's right to vote. In some precincts on the Southwest side of Phoenix there were reports of a fight. The scheme was to harass, intimidate and discourage poor black and poor Mexican-Americans from exercising their important vote in that crucial election..."

Mr. Robert Tate, in his affidavit, dated November 12, 1971 stated":

> "...I was present at Bethune Precinct, a predominantly black precinct in South Phoenix and witnessed the following incident:
>
> "Mrs. Miller had come to cast her vote at Bethune Precinct. She was encountered within the 50' line by William Rehnquist and requested to recite the Constitution before she could be allowed to vote. Mrs. Miller came to me crying, stating that Rehnquist wanted her to recite the Constitution. A call was placed to Judge Flood's office, a Justice of the Peace in South Phoenix, and Judge Flood came down to the Precinct. At that time Judge Flood deputized Jordan Harris to try and assist me, as a precinct committeeman, to restore order at the precinct. I looked around and saw William Rehnquist and Mr. Harris, who has a deformity in one leg, struggling. I went to the assistance of Mr. Harris. A policeman came in and took Mr. Rehnquist into the principal's office. Shortly thereafter Mr. Rehnquist left Bethune Precinct; however, a little later Mr. Rehnquist returned to the poll and parked his car across the street.
>
> "After Rehnquist left, I walked over to the police man and asked him the name of the fellow involved in the harassment of Mrs. Miller and the struggle with Mr. Harris. The policeman informed me that his name was William Rehnquist.
>
> "I now remember him from pictures I have seen lately in the papers as the same one involved in the above incident at Bethune Precinct. He did not, at that time, however, wear glasses."

Mr. Jordan Harris, another witness, whose November 12, 1971 notarized statement was introduced into the record in the NAACP's testimony stated:

> "...I ws present as a deputized challenger for the Democratic Party in Bethune Precinct, a predominantly Black Precinct in South Phoenix, and witnessed the following incident:
>
> I appeared at the polling place, Bethune Precinct, at approximatel 11 a.m. on the above mentioned date deputized by Judge Flood. When I arrived at the precinct I met with the election board committee and presented my official papers to them as a challenger for the Democratic Party. I met the Party Challenger for the Republican Party, Mr. William Rehnquist at that time. I met with Mr. Rehnquist because I noticed him harassing

> unnecessarily several people at the polls who were attempting to vote. He was attempting to make them recite portions of the Constitution, and refused to let them vote until they were able to comply with his requests. The persons involved were Mrs. Mitchell, Mrs. Campbell and Mrs. Miller. When I noticed he was pulling these people out of the line I then approached him and argued with him about his harassment of the voters. We then engaged in a struggle and the police were called in. Mr. Bob Tate came to my assistance during the struggle. The police then escorted him into the principal's office, Mr. Rehnquist and the police then left by the side door. I know that this man was Mr. Rhenquist because the election board introduced him to me as a challenger for the Republican Party. I believe that he did not leave the polling precinct altogether because I saw him across the street a short time later. He remained at the polling place well after 5 p.m."

The conduct recounted by the witnessses is the same type of conduct which led to the passage of the Voting Rights Act of 1965. It would be difficult for black Americans to believe that a person who harassed voters from the exercise of the most basic of all rights - the right to vote - would accord them justice in a court of law.

Mr. Rehnquist, as Associate Justice, has manifested his opposition to the protection of voting rights for minorities. In City of Rome v. United States, 446 U. S. 156 (1980), the majority held that a city could not unilaterally bail out of the preclearance requirement imposed upon them by Section §5 of the Voting Rights Act. Mr. Rehnquist dissented, arguing that the legislated conduct (requiring the state governmental units to obtain Department of Justice preclearance before a change in voting procedures or requirements would be effective) is necessary to to remedy a previous constitutional violation by the governmental unit or to prevent purposeful discrimination. In essence, there must be a causal relationship between a specific wrong by the City and the legislated prohibition. The NAACP also sees the use of the legal concept of causation by Mr. Rehnquist in cases of racial discrimination to restrict the application of the Equal Protection Clause of the Fourteenth Amendment.

B. Civil Rights - Public Accommodations

Mr. Rehnquist was not content to challenge black voters who sought to exercise the right of franchise, he also made his views known in the area of public accommodations when he opposed an ordinance being considered by the Phoenix City Council. His written statement said in pertinent part:

> "I am a lawyer without client tonight. I am speaking only for myself. I would like to speak in opposition to the proposed ordinance because I believe that the values it sacrifices are greater than the values it gives. I take it that we are no less the land of the free than we are the land of the equal and so far as the equality of all races concerned insofar as public governmental bodies, treatment by the Federal, State or the Local government is concerned, I think there is no question. But it is the right of anyone, whatever his race, creed or color to have that sort of treatment and I don't think there is any serious complaint that here in Phoenix today such a person doesn't receive that sort of treatment from the governmental bodies. When it comes to the use of private property, that is the corner drug store or the boarding house or what have you. There, I think we--and I think this ordinance departs from the area where you are talking about governmental action which is contributed to by every taxpayer, regardless of race, creed or color. Here you are talking about a man's private property and you are saying, in effect, that people shall have access to that man's property whether he wants it or not. There have been zoning ordinances and that sort of thing but I venture to say that there has never been this sort of assault on the institution where you are told, not what you can build on your property, but who can come on your property. This, to me is a matter for the most serious consideration and, to me, would lead to the conclusion that the ordinance ought to be rejected.

> "What brought people to Phoenix and to Arizona? My guess is no better than anyone else's but I would say it's the idea of the last frontier here in America. Free enterprise and by that I mean not just free enterprise in the sense of the right to make a buck but the right to manage your own affairs as free as possible from the interference of government..."

Fortunately, Mr. Chairman and members of the Committee, the Phoenix City Council passed the ordinance. Mr. Rehnquist, after the passage of the ordinance, in a letter to the Editor which appeared in the June 21, 1964 edition of the Arizona Republic wrote:

> "I believe that the passage by the Phoenix City Council of the so-called Public Accommodations ordinance is a mistake."
>
> "...the Public Accommodations ordinance summarily does away with the historic right of the owner of a drug store, lunch counter, or theater to choose his own customers. By a wave of the legislative hand, hitherto-private businesses are made public facilities, which are open to all persons regardless of the owner's wishes . Such a drastic restriction on the property owner is quite a different matter from orthodox zoning, health and safety regulations which are also limitations on property rights. It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this."
>
> "If in fact discrimination against minorities in Phoenix eating places were well nigh universal, the question would be passed as to whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places at all...,"
>
> "The founders of this nation thought of it as the 'land of the free' just as surely as they thought of it as the 'land of the equal'. Freedom means the right to manage one's own affairs, not only in a manner that is pleasing to all, but in a manner which may displease the majority. To the extent that we substitute, for the decision of each businessman as to how he shall select his customers, the command of the government telling him how he must select them, we give up a measure of our traditional freedom.

Mr. Rehnquist distinguishes rights of the few from what he terms universal [rights] saying:

> "Such would be the issues in a city where discrimination was well nigh universal. But statements to the council during its hearings indicated that only a small minority of public facilities in the city did discriminate. The purpose of the ordinance, then, is not to make available a broad range of integrated facilities, but to whip into line the relatively few recalcitrants. The ordinance, of course, does not and cannot remove the basic indignity to the Negro which results from refusing to serve him; that indignity stems from the state of mind of the proprietor who refuses to treat each potential customer on his own merits.
>
> "Abraham Lincoln, speaking of his plan for compensated emancipation, said: 'In giving freedom to the slave, we assure freedom to the free--honorable alike in what we give and in what we preserve.'
>
> "Precisely the reverse may be said of the public accommodations ordinance: Unable to correct the source of the indignity to the Negro, it redresses the situation by placing a separate indignity on the proprietor. It is as barren of accomplishment in what it gives to the Negro as in what it takes from the proprietor. The unwanted customer and the disliked proprietor are left glowering at one another across the lunch counter.
>
> "It is, I believe, impossible to justify the sacrifice of even a portion of our historic freedom for a purpose such as this."

Mr. Cloves Campbell, then an Arizona State Senator stated in an affidavit dated November 4, 1971:

> "I, Senator Cloves Campbell, do hereby testify that on or about June 16, 1964, a City Council meeting was held in the City of Phoenix for discussion of an ordinance dealing with public accommodations for all citizens in the City.
>
> "At that Council meeting, Mr. William Rehnquist, the present nominee for the United States Supreme Court spoke in opposition to the proposed ordinance.

> "After the meeting I approached Mr. Rehnquist and asked him why he was opposed to the public accommodations ordinance. He replied, 'I am opposed to all civil rights laws.'"

Mr. Rehnquist was an activist in Phoenix. He also opposed freedom of assembly, where civil rights was concerned. In testimony before an Arizona Legislative Committee, Mr. Rehnquist opposed the State's Civil Rights bill of 1965. Although the Arizona State Legislature did not keep a record of testimony before its Committees or in its state archives, Reverend G. Benjamin Brooks, in his testimony before this Committee in 1971, stated:

> "Well, however, do I recall the evening, late, when Mr. Rehnquist and I had a confrontation on the State Capitol grounds following his appearance. He argued that such a bill violated individual freedom to discriminate. This was the same argument he used against the City of Phoenix ordinance in 1964 at which time he wrote that such ordinances could not remove the 'indignity' suffered by the Negro when he is refused service in a place of public accommodations. But, he added, 'it redresses the situation by placing a separate indignity on the proprietor.'"

Reverend Brooks also stated that Mr. Rehnquist "was the only major person of stature who opposed the Arizona Civil Rights bill..." Reverend Brooks statement was buttressed by the statement of Mr. Moses Campbell (no relation to Senator Campbell), who in a letter dated November 3, 1971 stated:

> "I, Moses Campbell, do hereby attest to the following:
> I. That I was a member of the Civil Rights march on the Capitol building of the State of Arizona in the Spring of 1964.
>
> II. That I was present at the time our Past President, Rev. George Brooks, of the NAACP and Mr. William Rehnquist exchanged bitter recriminations concerning the groups purpose for marching, intimating that the march was communistically inspired.

> III. I believe that owing to the conduct of Mr. Rehnquist in his desire to disrupt and intimidate the Blacks in their peaceful presentation of what they considered just grievances to the State of Arizona's officials, that he has brought irreparable harm and insult to the Blacks of Phoenix, Arizona, and should not be considered for the lofty position as United States Supreme Court Justice."

Mr. Rehnquist's attitude toward civil rights demonstrators is further revealed in his February 14, 1970 letter to the Washington Post (on the G. Harold Carswell Supreme Court nomination). Mr. Rehnquist said:

> "In fairness you ought to state all of the consequences that your position logically brings to train; not merely further expansion of the Constitutional rights of criminal defendants, of pornographers and of demonstrators."

In a speech before the Newark Kiwanis Club, Mr. Rehnquist stated:

> "In the area of public law...disobedience cannot be tolerated, whether it be violent or nonviolent disobedience. If force is required to enforce the law, we must not shirk from its employment."

Mr. Chairman, within this past week, I spoke by telephone with both Mr. Cloves Campbell and the Reverend G. Benjamin Brooks, asking them to refresh their recollection regarding the incidents they submitted in 1971. Mr. Campbell told me that he recalled very clearly the statement of Mr. Rehnquist that he was "opposed to all civil rights laws". Reverend Brooks in a telephone conversation with me on July 28, 1986 stated:

> "Mr. Rehnquist did, in fact, come to the polls, challenging particularly the older voters and I remember old Mr. Killings (sp) who looked unkept struggling through it and reading the piece of literature We did not sustain the challenge. We let the man vote."

Reverend Brooks, speaking to the incident at the State Capitol stated, during our telephone conversation:

> "He [Rehnquist] met me at the State Capitol to argue the point of civil rights and the illegality of the public accommodations ordinance."

Mr. Chairman, I directed the NAACP's National Voting Rights Campaign in 1964 as a special assignment and recall the incidents reported to the National Office of the NAACP. I had a special concern regarding the Arizona incidents inasmuch as my regular assignment with the NAACP was as West Coast Director for Arizona, Southern California and Nevada. We were monitoring election activities to be sure that the recently passed Civil Rights Act of 1964 was not violated. The eyewitness accounts from Messrs. Tate, Campbell, Brooks and Cloves Campbell raised grave questions regarding the role of Mr. Rehnquist and whether he was candid in his recall during his 1971 appearance before this Committee. There is no doubt in our mind that Mr. Rehnquist was involved. One local newspaper, the Arixona Voice described Mr. Rehnquist as "Major Local Force to Keep People from Voting."

D. Civil Rights - The Fourteenth Amendment

A great deal of attention has been placed in recent weeks on a 1952 memorandum from Mr. Rehnquist to Mr. Justice Jackson which stated:

> "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think Plessy v. Ferguson was right and should be reaffirmed. If the Fourteenth Amendment did not enact Spencer's Social Statics, it just as surely did not enact Myrdahl's American Dilemma."

Mr. Chairman, this statement raises red flags for black Americans who cannot countenance even the thought of retrogression, much less to a period of time when the law of the land was that the black man had no rights that a white man had to respect.

As Associate Justice, Mr. Rehnquist has used various basic legal principles to bring about the bottom line of limiting the Fourteenth Amendment. He has publicly rejected the doctrine that the Bill of Rights is incorporated into the Fourteenth Amendment and thereby made applicable to the states. By so limiting the Fourteenth Amendment, more than one ideological purpose is served. The legal principles used in this fashion by Mr. Rehnquist include:

- limiting the doctrine of "state action" which triggers application of the Equal Protection Clause;
- limiting the protected groups or "suspect classes" entitled to the highest level of judicial scrutiny to protect their rights (Mr. Rehnquist deems only "race" as a suspect class);
- requiring claimants of racial discrimination to prove "intentional" discrimination;
- requiring claimants of racial discrimination to prove causation (legal/proximate cause) between the alleged (intentional) discriminatory acts and harm or wrong suffered by the claimant; and,
- categorizing the controlling legal issue decisive to the case as a procedural or evidentiary issue (even when there is substantial evidence of intentional racial discrimination).

The significance of using legal principle is that a rational argument is made which may convincingly lead one to agree with the result. Beginning with a basic legal principle, building upon it by reference to precedent, case law, authoritative treatises, etc. one may follow the views of another without divorcing the conclusion reached from the beginning legal principle. It is our considered judgment that Mr. Rehnquist, through the decisions he has written and his dissents, is creating his own precedents, and is, in his own fashion, a judicial activist against civil rights.

Civil Rights - Fourteenth Amendment - Substantive Limitations

(a) State Action v. Private Action

One source of constitutional limitations imposed on state action is the Fourteenth Amendment. The states can not deny persons equal protection of the laws. Although Mr. Rehnquist accepts the legal maxim that state action cannot be "racially discriminatory" state action was restricted in application by him. In the landmark case of Moose Lodge No. 107 v. Irvis, 407 U. S. 163 (1972), blacks were denied drinks by the lodge and argued that such denial violated the Fourteenth Amendment in that state action was present since the state had issued a liquor license to the lodge (a maximum number of licenses were issued by the state). Mr. Rehnquist wrote for the majority of the Court:

> "We conclude that Moose Lodge's refusal to serve food and beverages to a guest by reason of the fact that he was a Negro does not, under the circumstances here presented, violate the Fourteenth Amendment... 407 U.S. at 171,172
>
> "In 1883, this Court in The Civil Rights Cases...set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield,'... 407 U.S. at 172
>
> "In short, while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building... 407 U.S. at 175
>
> "The Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club which it licenses to serve liquor. 407 U.S. at 175
>
> "Appellee was entitled to a decree enjoining the enforcement of §113.09 of the regulations promulgated by the Pennsylvania Liquor Control Board insofar as that regulation requires compliance by Moose Lodge with provisions of its constitution and by-laws containing racially discriminatory provisions. He was entitled to no more." 407 U.S. at 179

In sum, Mr. Rehnquist's position was that the blacks who had been refused food service were only entitled, under the Fourteenth Amendment, not to have the state regulation enforced if that regulation was invoked to uphold the racially discriminatory provisions in the Lodge's constitution.

From another perspective, the Fourteenth Amendment is a restriction on what Mr. Rehnquist has termed "the state's plenary police powers." by extending the scope of "private action" or restricting the acts constituting "state action," Mr. Rehnquist is giving the states more freedom from the constitutional restriction of the Fourteenth Amendment.

(b) Limiting the Protected Groups or "Suspect Classes under the Fourteenth Amendment

The Fourteenth Amendment, notably its Equal Protection Clause is said judiciously to impose a higher standard of review upon the courts to protect the rights of citizens. Mr. Rehnquist limits "suspect class" under the Fourteenth Amendment to race. Classification by gender (sex) is not tantamount to being a "suspect class" (see *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Rostker v. Goldberg*, 453 U.S. 57 (1981)). In his opinion, alienage is not a "suspect class" (see *Sugarman v. Dougall*, 414 U.S. 634 (1973)). In his opinion, low-income or poverty does not make one a member of a "suspect class" (see *San Antonio School District v. Rodriquez*, 422 U.S. 1 (1972)). Age does not make one a member of a "suspect class" (see *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976)). Finally, illegitimacy does not make one a member of a "suspect class" (see *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *New Jersey Welfare Righs Organization v. Cahill*, 411 U.S. 619 (1973)).

(c) Requiring Proof of Intentional Discrimination

The Fourteenth Amendment's Equal Protection Clause entitles citizens to receive equal treatment in state action and those actions by private people within reach of the Clause. It has been shown in case law that Mr. Justice Rehnquist limits the Equal Protection Clause and the high standard of "strict scrutiny" to differential conduct based on one's race. He further limits, even cases of egregious differential treatment based on raxe by requiring racial minorities to prove "intentional discrimination." This proof of intentional discrimination has been articulated in school discrimination cases (see Wright v. Council of City of Emporia, 407 U. S. 451 (1972); Keyes v. School District No. 1, Denver, 413 U. S. 189 (1973); Milliken v. Bradley, 418 U.S. 717 (1974); Columbus Board of Education v. Penick, 443 U.S. 449 (1979); in employment discrimination cases (see Firefighters v. Stotts, 467 U.S. 561 (1984); in death penalty cases (see Vasquez v. Hillery, U.S. (1986); among other types of alleged unconstitutional racial discrimination.

In Keyes v. School District No. 1, Denver, supra, Mr. Rehnquist, dissenting from the majority opinion of the Supreme Court which held that proof of intentional segregative policy in part of the school district is sufficient to support a finding of a dual school system, argued, in part, that in Denver, unlike Topeka in the Brown v. Board of Education case, 347 U. S. 483 (1954), there is no law mandating segregation. In the words of Mr. Rehnquist:

> "There are significant differences between the proof which would support a claim such as that alleged by plaintiffs in this case, and the total segregation required by statute which existed in Brown. 443 U.S. at 255
>
> "In the Brown cases and later ones that have come before the Court the situation which had invariably obtained at one time was a 'dual' school system mandated by

> law, by a law which prohibited Negroes and whites from attending the same schools. 413 U.S. at 255
>
> "Whatever may be the soundness of that decision in the context of a genuinely 'dual school system, where segregation of the races had once been mandated by law, I can see no constitutional justification for it in a situation such as that which the record shows to have obtained in Denver. 413 U.S. at 258

Continuing in his dissent, Mr. Justice Rehnquist concluded saying:

> "The Court has taken a long leap in this area of constitutional law in equating the district-wide consequences of gerrymandering individual attendance zones in a district where separation of the races was never required by law with statutes or ordinances in other jurisdictions which did so require...since I believe (neither) of these steps is justified by prior decisions of this court, I dissent." 413 U.S. at 265

Clearly, Mr. Justice Rehnquist would have our laws distinguish remedying even racial discrimination based on laws, de jure discrimination, from racial discrimination based on facts, de facto discrimination. Challengers of discriminatory conduct would have to prove intentional discrimination in cases alleging de facto discrimination.

In the hallmark employment discrimination case of Firefighters v. Stotts, supra, Mr. Rehnquist concurred with the majority which found that Title VII had not been violated, neither the Fourteenth Amendment, when in that case there was a bona fide seniority system which had not been contractually modified in view of the economic crisis in Memphis which prompted the city to layoff firemen. (Since black firemen were "last hired" they had less seniority than most white firemen and, as a result, they were laid off in comparatively higher numbers.) In that case, the majority opinion stated:

> "Here, the District Court itself found that the layoff proposal was not adopted with the purpose or intent to discriminate on the basis of race. Nor had the city in agreeing to the decree admitted in any way that it had engaged in intentional discrimina-

> tion. The Court of Appeals was therefore correct in disagreeing with the District Court's holding that the layoff plan was not a bona fide application of the seniority system..." 467 U.S. at 577

In that the majority of the Court found no intentional racial discrimination finding by the District Court and no admission by the city, Justice Rehnquist could agree with the majority in this opinion. This is consistent with his expressed opinion that an Equal Protection Clause violation requires a finding of intentional discrimination.

In a recent death penalty case, similarly Justice Rehnquist argued for the necessity of intentional discrimination as part of the requisite legal elements for a violation of the Equal Protection Clause. In Vasquez v. Hillery, supra, the majority of the Court held that the 1962 indictment and later conviction of a black man, Booker T. Hillery, by a grand jury sworn in after blacks were systematically excluded, required the court to reverse the conviction. In that case, affidavits supported Hillery's previous allegations of racial discrimination in that no black had ever served on the grand jury in Kings County where Mr. Hillery was indicted and convicted. Mr. Justice Rehnquist joined Chief Justice Burger and Justice Powell in Mr. Powell's written dissent, saying in part:

> "The point appears to be that an all-white grand jury from which blacks are systematically excluded might be influenced by race in determining whether to indict and for what charge. Since the state may not imprison respondent for a crime if one of its elements is his race, the argument goes, his conconviction must be set aside.
>
> "This reasoning ignores established principles of equal protection jurisprudence. We have consistently declined (as argued in the dissent) to find a violation of the Equal Protection Clause absent a finding of intentional discrimination...There has been no showing in this case...that the grand jury declined to indict

> *white suspects in the face of similarly strong evidence*. Nor is it sensible to assume that impermissible discrimination might have occurred simply because the grand jury had no black members. (emphasis added).

In spite of the egregious factual situation that a black man was indicted, which led to his conviction, by an all-white grand jury, in a jurisdiction which had never had a single black on a grand jury, Justice Rehnquist adhered to the legal requirement of a finding of intentional discrimination before a case of racial discrimination violative of the Equal Protection Clause could arguably be made.

(d) Requiring Proof of Causation

Justice Rehnquist has echoed the legal principle of "causation" in a manner to find no violation of the Equal Protection Clause in the school desegregation case of *Milliken v. Bradley*, 418 U.S. 717 (1974); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976); *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979); in employment discrimination cases (see *Firefighters v. Stotts*, supra; *Firefighters v. Cleveland*, U.S. (1986)); in the cases challenging federal legislation providing for minority business set-asides (see *Fullilove v. Klutznick*, 448 U.S. 448 (1980)); in death penalty cases (see *Vasquez v. Hillery*, supra; *Batson v. Kentucky*, U.S. (1986); *Turner v. Murray*, U.S. (1986), among others. The exact legal jargon varies; however, the concept of "causation" is discernible to either argue that the actual harm was not caused by the alleged wrongful conduct or that the conduct was wrongful but the complaining party was not harmed by it.

In the case of *Dayton Board of Education v. Brinkman*, the Court of Appeals had found that intentional racial discrimination in violation of the Equal Protection Clause. Factually, in the 1950's, 77.6 percent of the students went to school in which one race accounted for at least

90 percent of the student body. Four schools were 100 percent black and 54.3 percent of the black students went to these four schools. Suit was brought in 1972 (and incurred two Supreme Court opinions - *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) and *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979)). The majority of the Court, in 1979, upheld the appellate court finding of intentional discrimination violating the Equal Protection Clause.

Justice Rehnquist dissented from the finding of a 14th Amendment violation saying:

> "Both the Court of Appeals for the Sixth Circuit and this Court used their respective *Columbus* (*Board of Education v. Penick*) opinions as a roadmap, and for for the reasons I could not subscribe to the affirmative duty, *the forseeability test, the cavalier treatment of causality*, and the false hope of *Keyes* and *Swann* rebuttal in *Columbus*, I cannot subscribe to them here. (emphasis added in underlinings other than for case names). 443 U.S. at 542

Continuing with the logic of "causation," Justice Rehnquist argued:

> "The District Judge in *Dayton* did not employ a post-1954 'affirmative duty' test. Violations he did identify were *found not have any causal relationship to existing conditions of segregation* in the Dayton school system. He did not employ a forseeability test for intent, hold the school system responsible for residential segregation, or impugn the neigborhood school policy as an esplanation for some existing one race schools. In short, the *Dayton* and *Columbus* district judges had completely different ideas on what the law required. As I am sure my Brother Stewart agrees, it *is* for reviewing courts to make those requirements clear." (emphasis added except for "is" which is underlined as well in the dissent) 443 U.S. at 543

Here Justice Rehnquist stressed that it is not sufficient to have even intentional racial segregation or discrimination. Also, one must prove that the conduct had a "causal relationship" to the racial segregation in the schools. In sum, the wrongful conduct must have caused the harm.

The other side to "causation," finding specific wrongful conduct is brought to the fore by Justice Rehnquist in *Fullilove et. al v. Klutznick, Secretary of Commerce, et. al*., supra. In that case the majority of the Court upheld federal legislation providing for government regulations requiring that 10 percent of federal public works contracts be set-aside for minority business. Justice Rehnquist joined Justice Stewart in his dissent arguing:

> "But even assuming that Congress has the power, under §5 of the Fourteenth Amendment or some otber constitutional provision, to remedy previous illegal racial discrimination, there is *no evidence that Congress has in the past engaged in racial discrimination in its disbursement of fedeal contracting funds.* the MBE (Minority Business Enterprise) provision thus pushes the limits of any such justification far beyond the equal protection standard of the Constitution. Certainly, nothing in the Constitution gives Congress any greater *authority to impose detriments on the basis of race* than is afforded the Judicial Branch. And a judicial decree that imposes burdens on the vasis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination." (emphasis added). 448 U.S. at 527, 528

Justice Rehnquist, perhaps, overlooks that Congress legislates usually after public hearings, it makes findings in the public interest or need and can legislate programs based on these findings. Perhaps he overlooks that congress is not restrained by the judicially-imposed concept of "causation." Nevertheless, Justice Rehnquist, in his dissent, stressed the need to tailor remedial provisions to remedy the "actual effects" of "illegal" race discrimination--the wrongful conduct.

Justice Rehnquist's use of "causation" to limit the legal remedy in response to wrongful conduct is seen clearly in *Firefighters v. Stotts*, 467 U. S. 561 (1984). In that case, a majority of the Court invalidated an affirmative action plan which was deemed to modify a consent decree. (Under the plan the City could not adhere strictly to seniority in deciding which firemen to layoff in response to the City's economic crisis.) Justice Rehnquist concurred in the majority opinion written by Justice White, which stated:

> "If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster...however,...mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." (emphasis added) 467 U.S. at 578

Clearly, emphasis is placed on requiring "each individual" to prove harm, "impact," on the individual by the wrongful conduct, "the discriminatory practice."

Specifically, the aspect of limiting the legal remedy, even in violations of the Equal Employment Opportunities Act (Civil Rights Act of 1964 - Title VII) is argued in the following quote:

> "That policy (behind Title VII §706(g)) is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the Congressional debates." (emphasis added) 467 U.S. at 580

While the legal jargon, "make-whole relief" has been added, the basic legal principle of "causation" is redressed to limit a remedy legally obtainable only to those who actually suffered from the illegal conduct.

Justice Rehnquist states the doctrine of "causation" most clearly in his dissent in Vasquez v. Hillery, supra:

> "The scope of the remedy depends in part on the nature and deegree of the harm caused by the wrong."

He criticized the majority which set aside the conviction and said:

> "Once the inference of racial bias in the decision to indict is placed to one side, as it must be under our precedents, it is impossible to conclude that the discriminatory conduct selection of Kings County's grand jurors caused respondent to suffer any cognizable injury." (emphasis added)

In Batson v. Kentucky, supra, the majority reversed the conviction of a black man for the death of a white person because the prosecutor used his peremptory challenges to exclude blacks from the jury. The majority held this violated the Equal Protection Clause as well as the Sixth Amendment. Justice Rehnquist said in his dissent:

> "Petitioner in the instant case failed to make a sufficient showing to overcome the presumption announced in Swain that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below."

In another case, a black man was denied his request to even question jurors about their racial prejudices in his trial for the death of a white person. The majority court reversed the death penalty sentence as well as the conviction in ruling that the Equal Protection Clause was violated alongwith the Sixth Amendment. Again, Justice Rehnquist dissented:

> "The facts of this case demonstrate why it is necessary and unwise for this Court to rule, as a matter of constitutional law, that a trial judge always must inquire racial bias in a case involving an interracial murder, rather than leaving that decision to be made on a case-by-case basis." (The majority said inquiry into racial bias was required when the defendant requested it; this necessitates a request by the defendant to initiate the inquiry and is not to be forthcoming from the trial judge.)

Justice Rehnquist continued:

> "Nothing in this record suggests that racial bias played any role in the juror's deliberations... Without further evidence that race can be expected to be a factor in such trials, there is no justification for departing from the rule of Ham and Ristaino"

He dissented against the majority ruling that the trial judge is to honor defendant's request to ask jurors questions of their racial bias. He also objected to scientific evidence, placed in the record, which indicated the racial application of death penalty statutes. Justice Rehnquist limited the weight accorded this evidence by, in essence, arguing the study conducted had no statistics on the administration of the particular death penalty statute in Virginia (the state of the trial). In so limiting the evidence introduced, and not permitting proferred evidence, the Justice analytically concluded:

> "There is nothing in the record of this trial that reflects racial overtones of any kind. From voir dire through the close of trial, no circumstances suggests that the trial judge's refusal to inquire particularly into racial bias posed 'an impermissible threat to the fair trial guaranteed by due process.' This case illustrates that it is unnecessary for the Court to adopt a per se rule that constitutionalizes the unjustifiable presumption that jurors are racially biased."

Justice Rehnquist even argues the opposite of the principle of "causation," e. g., that failure of the plaintiffs to show their harm was caused by racial discrimination is tantamount to showing their harm was caused by a reason other than racial discrimination. Notice in Firefighters v. Cleveland, supra, Justice Rehnquist and Chief Justice Burger dissented saying:

> "Here the failure of the district Court to make any finding that the minority firemen who will receive preferential promotions were the victims of racial discrimination requires us to conclude on this record that the City's failure to advance them was not on 'account of race, color, religion, sex, or national origin'" (emphasis added)

In sum, Justice Rehnquist uses "causation" in any of its aspects to limit application of the Equal Protection Clause.

Avoiding Use of the Fourteenth Amendment by Issue Classification

Justice Rehnquist has so turned the issue in legal procedural questions which would not have addressed even egregious racial disparity. For example, in Vasquez v. Hillery, supra, Justice Rehnquist dissented arguing:

> "The court has firmly established the principle that error that does not affect the outcome of a prosecution cannot justify reversing an otherwise valid conviction."

Throughout his dissent, he argues on the basis of harmless-error as distinguished from prejudicial error. This issue is an evidentiary issue. Justice Rehnquist did not rely on the fact that no blacks had ever served on the grand jury in Kings County. Instead, he argued:

> "In this case, the grand jury error did not affect the failure of respondent's trial or otherwise injure the respondent in any recognizable way. I would therefore reverse the Court of Apopeals."

In Batson v. Kentucky, supra, the majority of the Court reversed a death penalty case because blacks were systematically excluded from the jury by the prosecutor's use of the peremptory challenges. Justice Justice Rehnquist takes the position that the central issue in that case is not a question of racial discrimination but rather as a permissible use of peremptory challenges. His analysis highlighted the distinction and utility of peremptory challenges as compared to challenges for cause and ended by holding inviolate the legal principle of peremptory challenges. In so doing, Justice Rehnquist discounted the majority analysis stating:

> "Neither of these statements has anything to do with the 'evidentiary burden' necessary to establish an equal protection claim in this context, and both

> statements are directly contrary to the view of the Equal Protection Clause shared by the majority and the dissenters in *Swain*."

In refocusing the legal issue decisive of the case outcome, Justice Rehnquist said:

> "I cannot subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge, which has been described as 'a necessary part of trial by jury'. *In my view, there is simply nothing unequal' about the State using its peremptory challenges to strike (all) blacks from the jury in cases involving black defendants*, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on" (emphasis added).

Arguing that the use of peremptories is permissible even in cases of intentional racial exclusion, he says:

> "This case-specific use of peremptory challenges does not single out blacks, or members of any other race for that matter, for discriminatory treatment. *Such use of peremptories is at best based upon seat-of-the pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken.* But as long as they are applied across the board to jurors of all races and nationalities, I do not see... how their use violates the Equal Protection Clause."

His conclusion in the case is that:

> "Plaintiff in the instant case failed to make a sufficient showing to overcome the presumption announced in *Swain* that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below."

In concluding these comments on selected opinions of Justice Rehnquist, it is the NAACP's considered opinion that the results of his opinions is to limit the scope or application of the Fourteenth Amendment. Justice Rehnquist is certainly not extending the scope of the Fourteenth Amendment in claims of racial discrimination made by black Americans. To the contrary, perhaps he is consciously "extending" it to claims of discrimination made by white Americans. In any event, his actions are not in recognition of the historically social, political, and economic unequal and inferior treatment black Americans have experienced and are experiencing under the law and in reality. Rather, his arguable basis for "extending" the Fourteenth Amendment to claims made by white Americans is that the amendment protects any citizen.

In short, the judicial opinions of Justice Rehnquist manifest actions consistent with his opposition to civil rights laws. He has focused the Fourteenth Amendment away from discrimination against black Americans and other minority groups and toward protection for white Americans. He has employed legal principles of limiting the concept of "state action," requiring proof of intentional discrimination; insisting upon a causal relationship or causation between the discriminatory conduct and the harm complained of or the remedy sought; classifying the legal issue decisive of the case's outcome as a procedural issue rather than the substantive meaning of the Amendment - all with the effect of limiting the reach of the Fourteenth Amendment.

LIMITATIONS ON FEDERAL LEGISLATIVE POWER

A. The Tenth Amendment

Justice Rehnquist re-introduced and expanded upon the use of the Tenth Amendment as a substantive limitation on the exercise of federal authority. This observation was made in "The Compleat Jeffersonian: Justice Rehnquist and Federalism", 91 Yale Law Journal, 1317 (1982).

Mr. Rehnquist's views on limitations on federal power was evident in his dissent on the merits in Fry v. United States, 421 U. S. 542 (1975) wherein the Pay Board under the Economic Stabilization Act disallowed a portion of a pay increase voted by the State legislature. The Supreme Court affirmed the decision of the Temporary Emergency Court of Appeals disallowing the increase, acknowledging in the majority opinion that the Tenth Amendment "expressly declares the Constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system". But the Court opined that "we are convinced that the wage restriction regulations constituted no such drastic invasion of state sovereignty", 421 U. S. 542 (1975) n. 7.

Justice Rehnquist drew a distinction between "asserting an affirmative constitutional right" and "asserting an absence of Congressional legislative authority." He averred that the holding of the court was contrary to "a concept of constitutional federalism which should...limit federal power under the Commerce clause, 421 U. S. at 554. He contended that Ohio had an "affirmative constitutional right", as a state, to be free of economic regulation by Congress under its Commerce power. He noted that the "states right limiting Congress' power in Fry has "no explicit constitutional source."

His opportunity to further develop his theory of state sovereignty came in 1976 when he wrote for the court in National League of Cities v. Usery, 426 U. S. 833 (1976). Justice Rehnquist "reintroduced state sovereignty as a functioning legal limitation on the federal legislative power. While the case may be an aberration in the jurisprudence of the court, it is central to Justice Rehnquist's view of constitutional law.

B. Judicial Review of Federal Legislation

It is observable that Justice Rehnquist applies "a higher level of scrutiny to federal action than he does to state action (see "The Compleat Jeffersonian", _supra_).

Limiting Congressional Authority

Justice Rehnquist argues that courts must hear attacks on federal, but not state laws in a legal argument that Congress has exceeded its authority. Restrictions have been judicially imposed upon congressional exercise of authority under the spending power (see _Pennhurst State School Hospital v. Halderman_, 451 U. S. 1 (1981))and also authority under the Commerce Clause (see _Hodel v. Virginia Surface Mining and Reclamation Association_, 452 U. S. 265 (1981)).

In the case of _Hodel_, Justice Rehnquist insisted on sharp examination of the connection between interstate commerce, the asserted basis for congressional action, and the legislated conduct. Justice Rehnquist said:

> "In short, unlike the reserved police powers of the states, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause." (452 U. S. at 311).

First, it should be noted that federal authority under the Commerce Clause was deemed plenary in nature. However, Justice Rehnquist argues that state action under its police powers are plenary in nature. Second, the limitation on state power is a specific constitutional provision limiting state action (e.g. the Fourteenth Amendment).

His argument to restrict congressional legislative authority by arguing that Congress exceeded its authority is apparent in _Fullilove v. Klutznick, Secretary of Commerce_, U. S. (1980). In that case, Mr. Rehnquist joined Justice Stevens in a dissent (written by Justice Stevens) stating that:

> "The command of the equal protection guarantee is simple but unequivocal: In the words of the Fourteenth Amendment. 'No State shall...deny to any person...the equal protection of the laws.' Nothing in this language singles out some 'persons' for more 'equal' treatment than others."
>
> "No one disputes the self-evident proposition that Congress has broad discretion under its Spending Power to disburse the revenues of the United States ...and to set conditions on the receipt of the funds disbursed. No one disputes that Congress has the authority under the Commerce Clause to regulate contracting practices on federally funded public works projects, or that it enjoys broad powers under §5 of the Fourteenth Amendment 'to enforce by appropriate legislation' the provisions of that Amendment...If a law is unconstitutional, it is no less unconstitutional just because it is a product of the Congress of the United States."
>
> "On its face, the minority business enterprise provision at issue in this case denies the equal protection of the law...One class of contracting firms--defined solely according to the racial and ethnic attributes of their owners--is, however, excepted from the full rigor of these requirements respect to a percentage of each federal grant. The statute, on its face, and in effect, thus bars a class to which the petitioners belong from having the opportunity to receive a government benefit and bars the members of that class solely on the basis of their race or ethnic background. This is precisely the kind of law that the guarantee of equal protection forbids."

Narrow Interpretation of the Extent of Legislated Conduct

Justice Rehnquist has given undue emphasis and placed controlling weight upon one or two statutory words to negate the application of the proscribed conduct. The bottom line is that a party's conduct is not within the scope of the kind of conduct prohibited by Congress.

Congress enacted Title VII of the Civil Rights Act of 1964 which generally prohibits employment discrimination based on race, sex, national origin, etc. Justice Rehnquist strictly reads the language to forbid any discrimination, even race-conscious affirmative action plans designed to ensure equal employment opportunities. In United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U. S. 193 (1979), Mr. Rehnquist in his dissent states:

> "It may be that one or more of the principal sponsors of Title VII would have preferred to see a provision allowing preferential treatment of minorities written into the bill. Such a provision, however, would have to have been expressly or impliedly excepted from Title VII's explicit prohibition on all racial discrimination in employment. There is no such exception in the Act." 443 U. S. at 222.
>
> "To be sure, the reality of employment discrimination against negroes provided the primary impetus for passage of Title VII. But this fact by no means supports the proposition that congress intended to leave employers free to discrimiante against white persons." 443 U. S. at 229.
>
> "Here, however, the legisltive history of Title VII is as clear as the language of §§703 (a) and (d) and it irrefutably demonstrates that Congress intended meant what it said in §§703 (a) and (d) --that no racial discrimination in employment is permissible under Title VII, not even preferential treatment of minorities to correct racial imbalance." 443 U. S. at 230.
>
> "Indeed, had Congress intended to except voluntary, race-conscious preferential treatment from the blanket prohibition on racial discrimination in §§703 (a) and (d), it surely could have drafted language better suited to the task than §§703(j)." 443 U. S. at 253.
>
> "There is perhaps no device more destructive to the notion of equality than the numerus clausus-- the quota. Whether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to

> prefer another. In passing Title VII Congress outlawed *all* racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative." 443 U. S. at 254.
>
> "We are told simply that Kaiser's racially discriminatory admission quota 'falls on the permissible side of the line.' ...Later courts will face the impossible task of reaping the whirlwind." 443 U. S, at 255.

Causal Relationship between Constitutional Violation and Legislated Conduct

Congress has constitutional authority, under §5 of the Fourteenth Amendment to enact legislation to carry out the purposes of the Amendment. Mr. Justice Rehnquist argued in *City of Rome v. U. S.*, 446 U. S. 156 (1980) that this legislated action must be necessary to remedy the constitutional violation. In that case, the §5 preclearance provision of the Voting Rights Act imposed on state governmental units by Congress was held by the majority not to allow the states to unilaterally escape preclearance. Justice Rehnquist dissented arguing this congressional legislated adherence by a preclearance requirement was beyond the authority of the Congress.

In construing Title VII, Justice Rehnquist has looked keenly for specific discriminatory conduct within the meaning of the acts prohibited by Title VII to see if the legislated or judicial remedy narrowly responds to that conduct.

In *Local Number 93, International Association of Firefighters, AFL-CIO-CLC, Petitioner v. City of Cleveland*, U. S. (1986), Justice Rehnquist and Chief Justice Burger dissented, arguing:

> "There was no requirement in the (District Court) decree that the minority beneficiaries have been actual victims of the city's allegedly discriminatory policies. One would have thought that this question was governed by our opinion only two Terms ago in *Stotts*." U. S. at

> "I would adhere to these well considered observations (in Stotts and Railway Employees v. Wright), which properly restrain the scope of a consent decree to that of implementation of the federal statute pursuant to which the decree is entered." U. S. at
>
> "Even if I did not regard Stotts as controlling, I would conclude...that §706 (g) bars the relief which the District Court granted in this case."

In Local 28 of the Sheet Metal Workers International Association and Local 28 Joint Apprenticeship Committee, Petitioners v. Equal Employment Opportunity Commission, U. S. (1986), Justice Rehnquist and Chief Justice Burger dissented arguing:

> "I express my belief that §706 (g) (of Title VII) forbids a court from ordering racial preferences that effectively displace non-minorities except to minority individuals who have been the actual victims of a particular employer's racial discrimination...I explain (in Local Number 93 v. City of Cleveland) that both the language and the legislative history of §706 (g), clearly support this reading of §706(g), and that this Court stated as much just two Terms ago in Firefighters v. Stotts."

Even when Mr. Rehnquist apepars to express an opinion in support of discriminatory conduct against a minority protected by federal legislation, he stops short of finding a statutory violation in the facts. In Meritor Savings Bank v. Vinson U. S. (1986), the court ruled that "a claim of 'hostile environment' sex discrimination in the workplace is actionable under Title VII." This means that there exists a legal cause of action; however, the court stopped short of finding an actual Title VII violation from which the plaintiff (a black woman) could have been given relief by the court. For legal reasons, the case was sent back to the lower court. (It had been dismissed for failure to state a legal claim upon which relief could be granted by the court.) Justice Rehnquist wrote for the majority emphasizing that an employer could be liable for sex harassment. However, the dissent of Justice

Marshall, Brennan, Blackmun and Stevens went on to say that:

> "I would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave 'notice' of the offense."

Weight Given by the Senate to a Judicial Nominee's Philosophy

Judicial Philosophy

Much has been made of the need to focus on issues other than judicial philosophy in the consideration of nominees to the federal bench. The NAACP does not oppose that point of view; rather it is our belief that ideology or philosophy has an important bearing on fitness for a judicial position and consequently it should not be excluded from active consideration in determining the fitness of an individual to serve on the bench.

I am sure that the Committee recalls that President Nixon, on October 21, 1971, in announcing the Rehnquist nomination, averred that judicial philosophy was one of the major considerations governing his choice of Mr. Rehnquist. This point of view was also espoused by Mr. Rehnquist himself in a 1959 Harvard Law Record article which was quoted in the November 11, 1971 New York Times at p. C 47: Mr. Rehnquist wrote:

> "Specifically, until the Senate restores the practice of thoroughly examining inside of the judicial philosophy of the Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process. As of this writing, the most recent Supreme Court Justice to be confirmed was Senator Charles Evans Whittaker. Examination of the Congressional Record of debate relating to his confirmation would reveal a startling dearth of inquiry or even concern over the views of the new Justice on constitutional interpretation."

He urged the Senate to:

> "restore its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him..."

We concur with that position. The NAACP maintains that a lifetime appointment to the High court is the most important appointment any President can make. It gains added significance when the nominee is being considered for the position of Chief Justice. The Chief Justice has the opportunity to lead and shape the court for decades to come. Justice Rehnquist has already served almost a decade and one-half.

The importance of the Supreme Court was considered by the framers of the Constitution when they quite wisely did not entrust the selection of its membersto either the President not to the other co-equal branches of the government. The Framers decided that such a momumental task must be a shared responsibility between the President and the Senate.

Many have said that the only reason that Justice Rehnquist is being opposed is because of ideology or philosophy. That is a sound reason for the consideration of judicial temperament and philosophy. In researching our files, I came across a copy of the November 7, 1971 Congressional Record which sets out the Brest, Grey and Paul memorandum. According to these learned professors, the Senate during the 19th century refused to confirm some 21 nominees to the U. S. Supreme Court base, in large part, on political views; at least 7 nominees' political philosophy was a major issue during the 20th century.

Mr. Chairman and members of the Committee, the National Association for the Advancement of Colored People believes that judicial philosophy should be a prime consideration in considering this nominee.

Chief Justice Burger has reminded us of the impending 200th birthday of the signing of the Constitution. We should remember that another Chief Justice wrote the majority opinion in one of the most infamous cases in the Court's history. I speak of the Dred Scott decision. Chief Justice Taney held that the Constitution was not meant for blacks, be they free or slave, and that the black man has no rights that the white man was bound to respect. This decision was so out of touch with the mainstream of political thought, even during a period of slavery, that it hastened the War between the States and it has stood as a monumental blot on the Court's history.

In conclusion, there has been a lot of talk about the brilliance of the nominee and the fact that he was first in his law school class at a prestigious institution. We do not refute that, but we remind the members of the Senate that genius, devoid of compassion, distorts reality and cripples one's objectivity.

Thank you for this opportunity to be heard.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. How long have you been a member of Congress?

Mr. WEISS. Almost 10 years now.

Senator METZENBAUM. And you chair which committee?

Mr. WEISS. The Subcommittee on Intergovernmental Relations and Human Resources, of the Government Operations Committee.

Senator METZENBAUM. Before you came to the Congress, you were a prosecutor?

Mr. WEISS. I served for 4 years as an assistant district attorney in New York County.

Senator METZENBAUM. Do I understand you to say that you have pretty much been listening to the testimony that this committee has been taking in the past several days?

Mr. WEISS. Every moment that I could, Senator.

Senator METZENBAUM. Based upon your experience as a practicing lawyer, as a prosecutor, as a Member of Congress chairing a committee, do you have an opinion as to the Justice's credibility with respect to the Arizona matter, with respect to the Jackson memo, with respect to indicating that he had not seen, was not aware of the restrictive covenants on his property? Do you have an opinion as to his credibility in his answers on those subjects?

Mr. WEISS. I do, Senator.

Senator METZENBAUM. Would you care to state that opinion?

Mr. WEISS. In totality, as I watched and I listened to Justice Rehnquist, and heard the numbers of "I can't recall's" and "I don't remember's," spoken in a very soft and easy, laid-back manner, which nonetheless did not respond directly to many questions, and knowing some of the facts, having reviewed the history of his actions in Arizona and his apparent role regarding the restrictive covenants, it was my judgment that some of that testimony was incredible. I could not believe it.

Senator METZENBAUM. You oppose on behalf of your organization his confirmation. In your opinion, what is the single-most important reason why Justice Rehnquist should not be confirmed as Chief Justice?

Mr. WEISS. It is my sense that Justice Rehnquist simply does not understand the importance of a written Constitution and the Bill of Rights as the guidepost for the judicial determination of cases. And the Bill of Rights, it seems to me, is something that he can and will and has manipulated in a way that will achieve predetermined results. It seems to me that someone with that kind of predilection and record would be detrimental to the future of this Nation as the Chief Justice of the United States.

Senator METZENBAUM. The Justice indicated in a statement at an earlier point that we are no more committed to an integrated society than we are to a segregated society.

Do you have an opinion as to the importance and relevance of that kind of statement and its impact upon the community as a whole?

Mr. WEISS. Yes. If the Justice really believes that, then he must be in the tiniest part of 1 percent of the American people who have that view. I think that we have a national commitment to an integrated society. And if he starts with the premise that we do not and that the Constitution itself does not push us in that direction, then I think we can only have under his leadership a Supreme Court that will be at odds with the Nation.

Senator METZENBAUM. Based upon your review of his record, do you feel that the Chief Justice has exhibited a commitment to equal justice under the law?

Mr. WEISS. Whatever his own intentions and motivations may be, the result, as my fellow panelists have said and as I have said, in case after case, is that equal justice is in fact denied to minority positions, minority plaintiffs, to women, to people on the basis of sexual orientation. The State's position seems to be paramount in most of his decisions. On the basis of results, I do not think he has shown a commitment to equality of justice.

Senator METZENBAUM. Thank you, Congressman.

Ms. Smeal, has the National Organization of Women testified on many occasions with respect to the confirmation or in opposition to confirmation of judges before the U.S. Senate?

Ms. SMEAL. No. We have testified only very infrequently. The last appointee of Mr. Reagan, Justice Sandra Day O'Connor, we stood here to vote for confirmation.

Senator METZENBAUM. You did what?

Ms. SMEAL. We recommended confirmation.

Senator METZENBAUM. So that last time you appeared here supporting the nomination of Justice Sandra Day O'Connor.

Ms. SMEAL. Right.

Senator METZENBAUM. Since then, you have not been before the Congress?

Ms. SMEAL. Not in testimony.

Senator METZENBAUM. Let me ask you whether you care to discuss some of the specific cases. You gave us a group, and I know the time precluded you from spelling out those cases. But I wonder if you would care to addresss yourself to one or two that you consider more important or highlight the issue.

Ms. SMEAL. Yes. Thank you.

We have grouped the cases that we reviewed under three different headings. One was the due process and equal protection clauses, and what we said that with our ERA, of course, this is so important to American women; it is the basic guarantee.

Essentially under these clauses, he has ruled repeatedly—and it is not just one or two cases, but repeatedly—that it is OK to discriminate on the basis of sex as long as the State or business has a reason to do so. He calls it the rational test.

The reason, by the way, does not have to be concocted at the time the legislation is passed. It can be concocted years later at the time of the lawsuit. Just any reason, any excuse, even mere administrative convenience is OK for having a pattern of sex discrimination.

He is particularly remiss in this when it comes to discrimination on the basis of pregnancy. Essentially on the basis of pregnancy, and there is a lot of these cases, one, a Cleveland case for the Board of Education, by the way, Senator, a case that prohibited school boards from placing pregnant teachers on mandatory unpaid leave in the fourth month of pregnancy. He dissented, and he said essentially that the legislators had to be permitted to draw a general line just short of the delivery room. In other words, he did not wish to interfere with any judgment, and he excused their essentially causing pregnant women to lose their job just for administrative convenience.

There is case after case. As a matter of fact, when you go to statutes—in other words, his precedents under the area of the due process clause of the 14th amendment are just dreadful, but then he even did this when Congress explicitly passed laws to guarantee no discrimination.

For example, under title VII, for years it was interpreted that sex discrimination, discrimination in the area of pregnancy was sex discrimination. But he wrote and he actually invented a new classification. He said in *GE* v. *Gilbert* there are three types of people: There are men, there are women, and there are pregnant people; and that in essence, he did not see discrimination on the basis of pregnancy as anything to do with sex discrimination.

And so what happened, we as a movement had to go to Congress again to pass a Pregnancy Discrimination Act to prevent this type of interpretation. And then we go back in more cases, and he in essence would interpret that act in the most narrow of ways.

In fact, we think that what will happen if his viewpoints become dominant—and surely as Chief Justice he will have more sway—is that we will have to come back to Congress again and again for more and more statutes to carefully delineate what we mean when we say that there should be no discrimination on the basis of sex.

Senator METZENBAUM. If the Justice is confirmed by the Senate for the position of Chief Justice, do you feel that the women of America will have a concern as to their ability to obtain equal justice under the law before the Supreme Court?

Ms. SMEAL. There is no question of it. In fact, there is no question in my opinion if his views become dominant that the whole avenue of appealing to the courts for our rights will be indeed narrowed, and in some places actually closed.

That is one of the reasons I cannot stress more that the need to reject this appointment, because for us, it has been one of the few avenues of progress. Essentially, for women's rights, we have had to resort to the courts repeatedly. That is where most of the gains have been. He would close or so gut this avenue or change its direction that we would indeed, I think, be going backward.

Senator METZENBAUM. Ms. Simmons, there is some question whether Justice Rehnquist should be judged by his civil rights activities in the 1960's. Let me then ask you to assess his civil rights activities since he joined the Supreme Court.

What effect has his presence had on the important civil rights guarantees under our Constitution, especially the equal protection clause?

Ms. SIMMONS. There have been a lot of effects. In some of his decisions, take, for example, he has actually taken the position that there must be proof of intentional discrimination. And there are a long line of cases.

If you take *Keyes* v. *the School District of Denver*, Mr. Rehnquist there dissented from the majority opinion in that case which held that proof of intentional discrimination, segregation policy on the part of the School District was sufficient to support a finding of a dual school system.

Mr. Rehnquist at that time said that there were significant differences between the proof to support that claim with reference to segregation required by statute, which exists in the *Brown* case. He also said that in that case he felt that you had to have proof of intentional segregated policy. That concerns us.

Or if you take, for example, the case of *Batson* v. *Kentucky,* where the majority of the Court reversed the death penalty because blacks were systematically excluded from the jury by the prosecutor through preemptory challenges. The way he analyzed that was that neither of those statements had anything to do with the evidentiary burden that is necessary to establish equal protection in that particular context.

Or, for example, if you will take his position that he makes a distinction between de jure and de facto. And if you take the *Firefighters* v. *Stotts* case, Mr. Rehnquist concurred there with the majority to find that title VII had not been violated.

Senator METZENBAUM. Do you not get some satisfaction in knowing that Justice Rehnquist's position is that it is all right to keep blacks off juries in connection with cases having to do with black defendants as long as you keep Hispanics off juries with respect to cases having to do with Hispanic defendants and whites off white juries in cases having to do with white defendants? Does that not give you some comfort knowing that?

Ms. SIMMONS. It does not, Senator.

Senator METZENBAUM. I did not think it would.

Ms. SIMMONS. We believe that is disingenuous.

Senator METZENBAUM. Do you feel that that kind of protection or that comment in reference to it is all right to keep blacks off juries in connection with cases having to do with black defendants as long as you keep whites off juries having to do with white defendants sends a special kind of message to blacks of America?

Ms. SIMMONS. I think it sends the kind of message to blacks in America that what he is trying to do is narrow the scope of the equal protection clause; that he would want to provide rights for all Americans. He forgets the historical context, and we are concerned about that.

Senator METZENBAUM. Thank you. Mr. Chairman, I did want to point out that Mr. Mitchell who was to be on this panel did arrive. I hope we can take him with the next panel.

The CHAIRMAN. He can come on up now if he wants to. No, we will take him the next panel.

Senator METZENBAUM. Fine.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. I will just reserve my time.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. Is Mr. Mitchell going to testify now or with the next panel? If he wishes to go ahead, I can wait.

The CHAIRMAN. We will just hold him for the next panel in a few minutes.

Senator HEFLIN. Let me ask each of you a question. For the first question, there are three assumptions that I would like you to make. First is, assuming that the nominee Justice is confirmed, assume that he is confirmed, and that Justice Scalia is placed on the Court. That is the first assumption.

The second assumption is that Justice Rehnquist does not turn out to be any more of a consensusbuilder as Chief Justice than he has as an Associate Justice—due to individual factors or whatever.

And third, that Ronald Reagan does not appoint any other nominees to the Court. He does not appoint any other Justices to the Court during his term of office.

Now, making those three assumptions, how do you think William Rehnquist as Chief Justice will affect the decisionmaking function of the Supreme Court any more than at present?

Mr. WEISS. I am not sure if I have a good enough crystal ball for that, Senator. I think that certainly Justice Rehnquist has the intellectual capacity and the ego in a positive sense, and the will and determination to exercise his role as the Chief Justice. And it is my sense that the Associate Justices will defer to him in his role as the administrator and as the assigner of cases.

So I do not think that the presence of any other new member or the existing members can in any way take away the powers that he would be granted as the Chief Justice. Whether or not he will be able to build a consensus on the Court still remains to be seen, but certainly he will be in a more powerful position to do that as the Chief Justice than he has been as an Associate Justice.

As to the last assumption, I can only say Amen.

Ms. SMEAL. As the Chief Justice, he has several roles, one of which is indeed symbolic but certainly important. You are putting in that position the most extreme position against women's rights and minority rights, in no way a person in any form of a mainstream or centrist, absolutely the extreme position in opposition.

And I know there has been a lot of inferences here that Burger and Rehnquist are two peas in a pod or very much alike. But if you review their decisions, they certainly are not. The decisions of Mr. Rehnquist are definitely in the area of women's rights more extreme. In the area of right to privacy, I will just remind you that Burger was in the majority on that decision, and Mr. Rehnquist was in the minority on that decision.

In the whole area of affirmative action, Mr. Rehnquist is dependably the most extreme person in opposition or limiting. So you would have the person who convenes the Conference, who sets the tone, the most conservative—but I think that word is being used wrong here. I do not believe this is conservative. This is not trying to keep a status quo. This is trying to go backward. That is why I use the word with care reactionary. It is to go back in time, before, to a previous state. And for women, I mean, this constant harking back to the intention of the framers and a static view of the Constitution only to use literal words will eliminate women. Because in the literal sense of the word, even under the 14th amendment, there was no intent for women to have equal rights. But surely to God, this Constitution must be looked upon as a living document, one that keeps up with the times and the changing positions of people in our society, and certainly the changing roles of women in our society.

So I think it makes a great deal of difference, a great deal.

Ms. SIMMONS. I think if Mr. Justice Rehnquist, Senator Heflin, was coming here for a position on the Supreme Court, sure, we would oppose him, based on some of the actions we know about.

But I think that with him here in the role as Chief Justice with the opportunity to lead and shape the Court, we have grave reservations.

We listened with care to his testimony and we are not convinced. We are concerned about the position he took in the Jackson memorandum where he indicates what he thought about the *Plessy* decision.

We are concerned about what I call, and what they refer to sometimes pejoratively, as judicial activism. I see Mr. Justice Rehnquist as being an activist and trying to take us back pre-*Brown*. The NAACP believes that if he did become Chief Justice, and we have not completed our examination of Judge Scalia's record, that you would have a shift in the Court so that you would not have as many 5-to-4 decisions I think that you would have Mr. Justice Rehnquist being certain to assign cases based on an attempt to shift the Court the way he feels the 14th amendment should be interpreted, and that is narrowing of the 14th amendment.

And for persons who are the descendants of a slavery background such a narrowing of the 14th amendment is unconscionable in America. We believe that something has to be done to try and make minority Americans first-class citizens in this country. And we do not see, based on the actions of Mr. Justice Rehnquist, that he is moving in that direction. Therefore, it is the NAACP's position that it would be an unconscionable thing for persons whose skin is the color of mine if he became Chief Justice.

Senator HEFLIN. Well, let me ask you one other question.

Take the first two assumptions, assume the swap of Scalia for Burger makes no difference as to ideology and the consensusbuilding ability remains the same with Rehnquist as at present.

Now, assume Ronald Reagan appoints two additional members during his term of office. What affect do you think that the presence of Chief Justice Rehnquist would have upon the decisionmaking function of the Court as compared to the present?

Ms. SIMMONS. I do not see Mr. Justice Rehnquist as a consensus-builder. I am formerly from Texas. We have a phrase there you call maverick. I see him as a maverick. And he would not be able to build consensus as necessary on cases such as the *Brown* case, or that would be necessary in other cases of such magnitude. I do not see that.

Mr. WEISS. Senator, it seems to me that you have just created at the very least a 6-to-3 majority for Mr. Rehnquist's position, with him in the saddle calling all the shots as the Chief Justice that are within his power to call.

And it seems to me that we would then face a dreadful period in American history.

Ms. SMEAL. If that scenario was the case, then all of his extreme positions, he would flaunt them. It would become—they would be unbridled. In fact, the hope for women's rights and minority rights, for us ever to be equal citizens in the next 25 to 30 years, it would be dashed from going to the courts. We would have to have profound constitutional change coming from the legislatures and from Congress and through the referendum process.

In fact, I think it would throw us into turmoil. Certainly no slow evolutionary change, but you would have to have much more drastic change. And you would open all of the old fights only with much more intensity and much more bitterness and much more cynicism upon those of them who have fought so hard for human rights, because we have not only been down the path, we have been led down the primrose path.

I cannot believe that we would be contemplating this in this decade.

Senator HEFLIN. Well, the difference between those two questions, really, as to the severity that you spoke of is not dependent so much on William Rehnquist as on Ronald Reagan, is it?

Ms. SMEAL. No; it is not, because Ronald Reagan could elevate—there could be other people of that political persuasion elevated that would not be so extreme.

Sandra Day O'Connor would not be this extreme. You could go on with a whole host of people. You are taking a person who has almost a joy at writing extreme language. The positions that he writes are not tempered in any way. And I think that there are a lot of scenarios that you could write that would not be, even with the same person appointing, would not be as bad.

This would be the worst case scenario. That is why you see all of us up here. You see an absolute united civil rights and women's right and civil libertarian community appalled. I mean we know who won the election in 1984. But this is preposterous, that you put the most extreme position in the highest position of the third branch. And there has to be some temperance. There has to be some recognition that in these views there was no consensus to undo the interpretation of the 14th amendment and civil rights and women's rights in the election of 1984. That was not what was at issue, but that is what will be the result, that is what will be the legacy. There was no election or referendum to do this.

Mr. WEISS. Senator, may I add one word?

It seems to me that you have asked a very, very profound question. Because much of the discussion so far has been premised on the Court continuing as is in its philosophical complexion with Justice Rehnquist as the Chief Justice.

And you have now factored in the future and the recognition that the Court is dynamic. Given the composition of the Court, there will have to be changes, whether Ronald Reagan or another President makes them. And you have to look at Justice Rehnquist not as he will be for, say, the next 2 or 5 years with the rest of the Court being what it is now, with the exception of perhaps the Scalia confirmation, but what it will be in the future.

And I think that you clearly opened a very, very serious line of thought.

Senator HEFLIN. That is all I have.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman.

First of all, I want to welcome my former House colleague, Ted Weiss, here as well as the other witnesses.

Ms. Simmons, you were here until the last witness testified last night—I say that for the benefit of Dr. Hooks back there so he knows you were putting in your time. Hope you get overtime for it. [Laughter.]

Last night I asked Dean Griswold about the symbolic role of the Chief Justice and Dean Griswold said that he thought that, as Chief Justice, Justice Rehnquist might not influence his colleagues but be influenced by his colleagues to moderate his position.

Do you have any reaction to that?

Ms. SIMMONS. Yes, I do, Senator.

With due respect to the learned deans I disagree. When you take a look at the record of Mr. Justice Rehnquist, I do not see a person who is influenced by others. I see a person who influences others.

I think that symbolically it would send a message to black America, to women in America, and I am black and female so I have a double dose of it, you send a message that we are not concerned about the rights of minorities, that we are concerned only about ideology.

And I think in this great country of ours, we have to be concerned, be certain that every group is able to feed at the table. And I do not see Mr. Justice Rehnquist, despite what he said when he was on the witness stand—he said that he would cheerfully do this and he would be able to do the other—I do not see him as a consensus builder. I see him as shifting the Court. And I think that is what it is like.

Senator SIMON. Ms. Smeal.

Ms. SMEAL. Well, I think there is one remarkable thing, and when you look at the record of Justice Rehnquist, is his consistency of behavior since his days as a law clerk for Justice Jackson. I think the reason people ask us why do we bring up the past so much, we bring it up because it, in fact, in this case has been attributed to the future. He has not changed. It has been a consistent pattern from his days as a law clerk to his days as an attorney, to his days in the Court, from his early decisions to now. He has been remarkably consistent in opposition to individual rights in this country.

And I cannot see that he would move. I think that he, in getting more power, would just be—I have a feeling now that he would have no restraint. I think it would go just in the opposite direction.

Mr. WEISS. On two occasions in the course of your hearings, Justice Rehnquist himself indicated that he did not expect that he would change.

And he also said, on at least one occasion, that people bring to the bench the philosophy that they had before they got there.

So he certainly is not expecting to see any kind of major changes, and his record certainly indicates, that he is very, very consistent.

Senator SIMON. One final question.

There are some who argue that we are not changing any votes by this shift. And then the question comes up, how important is the Chief Justice simply as a symbol? The very thing you referred to, Ms. Simmons.

Ms. SIMMONS. I think the Chief Justice's symbol is extremely important.

I recall some 26 years ago when I joined the staff of NAACP. The Supreme Court was the supreme symbol of equality for black Americans. The NAACP always took cases with the firm intent of going to the Supreme Court to get justice. And I think that with Mr. Justice Rehnquist as Chief Justice, we could not do that.

And, symbolically, a message would be sent to black America that you cannot be heard, you cannot receive justice, because black Americans are not going to forget the allegations with reference to the ballot security project. They are not going to forget that. Because to black Americans the right to vote is the most basic right of all rights.

Ms. Smeal. In the first place, I do think there is a change in votes, and I want to emphasize that. This man has had 54 lone dissents. His position has been the most extreme.

In replacing Burger, you are going to be replacing him with two men, if they are both confirmed, who would, in more cases than not, and certainly in more cases than Burger, vote against the rights of individuals and, indeed, in the area of right to privacy, you have two much more extreme viewpoints. And, of course, that is very important for women's rights and birth control.

So there is no question in my mind that in due process, equal protection and interpretations of the statutes, and in affirmative action and the whole standard of review for sex discrimination, you are getting—you have lost the vote. You are going further away from equal justice.

So I do believe you cannot just say this is trading two types of the exact same type of ideology. It is not. We are going to lose more cases for women and minorities with this combination.

Now, in addition to this one symbol, I was trying to think, you know, you teach schoolchildren a lot about what justice means by the human beings who occupy the highest positions in our country. You teach black children and white children and young girls and young boys a lot by looking at the history and the background of the great leaders of our day. Look at the background that we are about to select for the Chief Justice of this Court, a background that, at best, raises many questions about what did he believe, about the rights of minorities? Not when he was, you know, a little boy but, in fact, when he was a grown adult, a practicing attorney. It is not one that you would want to reveal much about.

And then I still say, and I commend Senator Kennedy for pushing so hard yesterday, that you cannot have in the background so many questions in why were not certain papers released? What did those papers and memos say? Surely, this is not a symbol that one teaches any kind of concept of equality of justice for all standing above in advance of one's time. It is just the reverse.

Mr. Weiss. Senator, I had in my opening statement occasion to refer to Justice Rehnquist's days in Arizona around the peak of the civil rights fights in 1964.

At that time, he appeared before the city council in Phoenix, AZ. arguing against an ordinance to provide equal access to public accommodations. A little later that same year, one of my constituents, a young man named Andrew Goodman, together with two other young Americans, was killed as participants in what was called Mississippi Summer, having gone down to Mississippi in an effort to open the system both for voting rights and for equal access to all facilities that all Americans should have equal access to.

Justice Rehnquist was during that period also challenging the right of black and Hispanic voters to participate in elections. Now, to elevate that man to the Chief Justice's position is quite a different thing from having him as the single most radical minority Associate Justice on the Supreme Court. It, in essence, tells all of America and the rest of the world where we are. And I just do not think that that is the kind of symbol that America ought to project.

Senator SIMON. I thank you.

Thank you, Mr. Chairman.

Senator HATCH [presiding]. Senator DeConcini, I think, is next.

Senator DECONCINI. Mr. Chairman, I have no questions.

Senator HATCH. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I too want to join in welcoming the panel here, and also welcoming Clarence Mitchell whose family has a very long and important tradition before this committee on issues of civil rights. And we welcome the opportunity to hear Clarence Mitchell.

Congressman, we thank you for coming. You have referenced the ballot security program. You really did not have much chance to get into the background of that program. It really was a euphemism to deny blacks and browns the right to vote, is that not the bottom line, assessment of that program?

Mr. WEISS. That is the way the history seems to be.

Senator KENNEDY. You know, the sanitized explanation is that while we have allegations, we have charges about difficulties in various precincts, the fact is that was organized by one political party, utilized by that political party to harass members of the other political party in carefully targeted precincts.

And in this case it was to harass blacks and browns in precincts in Maricopa County, in Phoenix. And certainly one of the principal architects of that program was Mr. Rehnquist at a time when this country was attempting to address the issues of the right to vote, the Voting Rights Act.

And as you recall, your friends from New York, I can remember Schwerner and Goodman, Cheyney, who met their tragic fates in an attempt to try to ensure that citizens in this country were going to have that right to vote. And around that same period of time, whether it is 1958-60, 1960 to 1964, this nominee was involved in an intimate way in a program to ensure that individuals were going to be denied that right.

We will hear later direct testimony by people that have not got any ax to bare, but say that he was personally involved. We will hear their testimony.

So I welcome the fact that you have raised this issue.

I want to again thank Ellie Smeal and Althea for coming here this morning and for speaking.

They both talked about the question or the criteria that ought to be used. I, too, have reached the conclusion that this nominee is outside of the parameters in terms of consideration, positive and favorable consideration.

I am just wondering, very briefly, because we are running into the time—of the number of nominees that you, either NOW or the NAACP have really opposed in recent time, can you tell me--it seems to me you have been up here on some of the particular nominees for Federal district sometimes, and some of the circuit courts. But I was just trying to think back over the 24 years I have been here, I am trying to find out whether this is business as usual. This will be the charge. Well, they are back here again. Or whether this is a question, now, Ms. Simmons, representing the NAACP, the reason why you are here is because you believe that the membership you represent will effect, if this nominee is elevated to the office of Chief Justice, will be so outside the basic framework of what would be considered to be acceptable parameters in terms of political philosophy that your membership would have lost all hope.

The specific question is, how many times have you been up here on the recent nominees, and I think finally, although you have each answered it, but one that I think is important for the Members of the Senate and the American people to hear is, how distressed would your membership be every time they see thet Court sit and the robes around this particular Chief Justice if he is elevated.

Ms. SIMMONS. Recently, Senator, we have opposed Fitzwater——

Senator KENNEDY. I am talking the Supreme Court now.

Ms. SIMMONS. Supreme Court. Haynesworth, Carswell.

Senator KENNEDY. Haynesworth and Carswell. Both rejected.

Ms. SIMMONS. Right.

Senator KENNEDY. Both rejected by the Senate of the United States.

You commented and testified on both of those nominees, and the—you listened to, obviously, and helped in making a case for a variety of different considerations. But that goes back.

Since then we have had Blackmun. Since then we have had Powell. Since then we have had Sandra Day O'Connor. They might not have been the kinds of nominees that you would have recommended, but I do not remember your being up here and testifying.

Ms. Smeal?

Ms. SMEAL. We have been up here very few times.

Senator KENNEDY. Just on the Supreme Court.

Ms. SMEAL. I understand Betty Friedan, who was our founder, testified against Carswell. I believe that we might have testified against one other. We stood here testifying for Sandra Day O'Connor. But very, very few times. We did not do a total review.

Senator KENNEDY. Well, this is a point, that whether we are talking about Powell or Blackmun or Sandra Day O'Connor, others, they, at least as I understand from your positions, conversations with the various groups, they felt that your various constituencies, the groups that you represent, still would have a sense that justice could be obtained.

And as I understand the bottom line in reviewing your testimony, you believe that if this nominee is elevated to this position, that your members—we will start off with you, Ms. Simmons—your membership will be so distressed, so distraught, that they may very well lose hope that they can find equal justice under law?

Ms. SIMMONS. Senator, our Resolutions Committee did not come out with a resolution on Mr. Justice Rehnquist. When we hit the floor with resolutions, before we could take up anything, the membership insisted, in convention, that we be sent back to the drawingboard, and to come out with a resolution opposing Justice Rehnquist.

That is how they felt about it.

Senator KENNEDY. And that is based on both the legal and other kinds of activities.

Ms. SMEAL. Well, the entire feminist community is in opposition to these appointments. And the feminist legal community is especially alarmed.

Remember, women do not have an equal rights amendment. So you are elevating to the highest position the person who has the loosest standard of interpretation, the weakest under the due process and equal protection clause, on the current Court.

Essentially, we are very vulnerable; very fragile position. And he has taken a position, essentially, that any kind of sex discrimination, if you can think of any kind of excuse or reason, is OK.

So we are just very united that this is the worst possible choice for this high position that we could see. And indeed, I think, would fundamentally change how we would approach advancing women's rights, if this became the dominant view. And certainly even as a symbol will greatly affect the process of how we go about effecting change for women's rights in our country.

Senator KENNEDY. If the record would show that both organizations, going back to Haynesworth, Carswell, Blackmun, Powell, and O'Connor, that with regard to the NOW group, they supported O'Connor and were not opposed to any of the others. And with regard to the various civil rights groups, the NAACP only opposed Carswell and Haynesworth which were rejected by the Senate.

And I welcome the fact, I think it is of especial importance, that we hear the message that you have given to us this morning. I think it is an important message. I think it is much more attuned and reflective of what is the real, accurate viewpoint of millions of Americans, women in our society, others in our society who care about the whole issue of second class citizens, whether in our society—this is an important message that has been given by you, Ellie Smeal, and Althea Simmons.

I think it is really a message about what this country is about, which direction we are going to go in in terms of the future. And I welcome the fact—eloquent statements. And I thank you very much for raising the consciousness both of this institution, and hopefully, across this country.

And I hope it is a message that will be heard.

Thank you.

Senator HATCH. Senator Biden.

Senator BIDEN. Thank you.

I apologize to the panel for not being here. We are marking up the South African sanctions bill in the Foreign Relations Committee at this very moment, and I will be coming in and out.

How the three of you who have testified so far respond to the point made by the Senator from Utah, that in fact Mr. Justice

Rehnquist has not been in dissent the most of any Justice, that he has not been the lone dissenter as he has been painted.

I believe the Senator from Utah cited statistics showing that other Justices, Justice, had a single dissent record that was higher.

And second, how do you respond to the argument that what happened 35 years ago should not be the test; the test should be what his performance has been on the Supreme Court the last 15 years?

Mr. WEISS. Some of the testimony that I heard late last night on television indicated that the statistics that Harvard keeps year after year have found that Justice Rehnquist is the single most frequent dissenter, especially in the area of civil liberties and civil rights.

Perhaps that is really the key; the areas in which those dissents have taken place.

In looking at Justice Rehnquist's record, we are not just going back to things that took place 35 years ago. We are going back to things that took place in 1964, 1966, 1968, 1969, and 1974, in addition to the record that he compiled as a Supreme Court Justice.

This is especially important in light of his own acknowledgement that he brings to his new position, as he did to the Supreme Court, the philosophy that he had before he got here.

I think all of those matters are absolutely relevant as he seeks to assume this new important position.

Senator BIDEN. Thank you.

Ms. Smeal.

Ms. SMEAL. I think some of his lone dissents are particularly revealing of how difficult it is for him to change his mind on certain issues.

I think the *Bob Jones* dissent is one of the most revealing. Here he is the lone dissent on whether or not the IRS regulations, tax exemption, can be given to a university that practiced a form of racial discrimination, or segregation. And as the lone dissent I think he totally, so narrowly, legalistically interprets what the whole temper of the times—he would allow segregation under the IRS rules. And totally shows to me how determined he is to extend his past into the future.

I think the reason why it is appropriate to bring up the past is because it in fact does—is constantly reiterated and is constantly reaffirmed by what he does as a Supreme Court Justice. And his record substantiates that he has not changed.

I was trying to think, when a symbol—the symbol really is of a person who has practiced some forms of segregation, and brings that past, which none of us can be very proud of, into the present; maybe not using those terms, but by so interpreting the law that would make it possible.

I was trying to think when Senator Kennedy—have we ever opposed—who have we opposed before here. And I think—we did not review that, it has been so infrequent. But somewhere in the back of my brain I think that we opposed Justice Stevens because of some of his immediate—right before he was elevated, some practices on sex discrimination.

Now I can tell you though, if he was to be elevated to the Chief Justice, even if we had opposed him, we would rapidly have changed our minds.

Senator **Kennedy**. What kind of judge do you think he has turned out to be?

Ms. **Smeal**. Because he has turned out to be a Justice that many times supports the elimination of sex discrimination and other forms of discrimination, and he is for women's rights.

I would be the first to say that if we did that—and I think we might have—that we were—that we had made a mistake, and by golly, he can show that he can interpret the law so that he could extend more rights to people.

But on this person, whatever was done in 1971, and I do not know if we testified against Mr. Rehnquist in 1971—if 49 we did not, we should have and we missed the boat. And by golly this record of the last 15 years leaves no doubt where he is going to be as Chief Justice. He will be a leader, and I see him standing in the doorway for progress for both my daughter and my granddaughter if he stays there that long.

Senator **Biden**. Let me ask you a followup question, and then I will ask you to answer both, Althea, if I may. And I do not want it to keep you too long, because we are limited in time, and I am afraid we are not going to get all the panels in.

The charge will be made that in fact you are, quote, a single-issue person, and the organization you represent is, the NAACP is, quote, a single-issue group, that is the charge that is made.

Let me ask you the following question. If, in fact, the nominee were sent to the Senate from the Supreme Court, and the nominee's record on women's rights was in compliance with what your organization stands for but for the fact that that nominee had written a law review article saying *Roe* v. *Wade* was a bad decision and should be overturned; but in every other thing that had occurred, statutory interpretation, other constitutional questions, application of the 14th amendment, applying the same standard to women as to minorities, to blacks, would you be here testifying against that nominee, if the only thing on the record that disagreed what you stand for as an organization, as saying that *Roe* v. *Wade* should be overruled.

Ms. **Smeal**. You notice when I started my testimony—I do not know if you were in the room, Senator—I said that I was here in the role as president of NOW and I was going to limit my remarks to sex discrimination.

But I will be frank that I felt limited in that role, because I view that his most shocking positions on the record—it is a whole pattern on how he views minorities.

In fact, his records in minority rights, individual rights, civil liberties, across the board, I find so disturbing.

Not that I am apologizing for representing women; we are over half the population of this Nation. And I just get rankled when I hear that we are a single issue. I mean any Justice that cannot look at women's rights in the most broadest sense—give us a break; for heaven's sake, after 200 years of discrimination—should alone be rejected on that premise alone.

But I understand the peculiar standards that we still have for women. And I do know that on race discrimination there is more of a consensus in our Nation that it is wrong than on sex discrimination.

And so it is just shocking that we would be considering for the highest position—by the way, I also feel——

Senator BIDEN. Ms. Smeal, I am not sure you have answered my question.

Ms. SMEAL. On *Roe* v. *Wade* alone—I feel that on *Roe* v. *Wade* alone you could make the case that the President of the United States, or any group, that wanted to change the position, that they could appoint Justices to change it.

However, I still think that would be going around how you amend the Constitution of the United States.

Senator BIDEN. Thank you.

Ms. SMEAL. I think the Constitution should be amended by a three-fourths vote of both Houses of Congress, and two-thirds vote of the States—just the reverse, two-thirds vote of both Houses of the Congress; three-fourths of the State.

That is why I have not answered you. Because I do not know what I would do on that alone.

Senator BIDEN. I think you are being honest about that, and I appreciate it.

Ms. Simmons, let me ask you a question, if I may.

The standards that should be applied in choosing a Justice of the Supreme Court, in this case a Chief Justice of the Supreme Court, standards that should be used by the U.S. Senate:

Is it your position that if we disagree with the ideology of the nominee, that we should vote against that nominee, notwithstanding the fact that they be, by all other standards, you know, decent, honorable, bright, capable. But they just have a different philosophy.

Or is it your position that their philosophy has to be beyond the mainstream of American politics to be rejected?

We keep using the term, "extreme." One saying, for example, saying I disagree with the philosophy of some of my colleagues and some of the sitting Justices, but I must admit that they are within the mainstream of American politics; that they in fact are not outlandish differences. I have differences with mainstream Republicans on their philosophy, and some Democrats.

But there are others whose philosophy seems to be outside the mainstream, that they are so unusual, that they are so on the edge of what is acceptable in this society, that they are in a different category.

What argument are you making? Is it, merely because I disagree politically with a nominee, I should vote against him? Or: that nominee has to be on the edge, beyond the pale, before—assuming all other things—they are qualified in other respects?

Ms. SIMMONS. My response is those who are beyond the pale, outside of the mainstream. That is important.

Senator BIDEN. That is helpful. Because what I worry about is, I worry about this nominee to start with.

Ms. SIMMONS. We do, too.

Senator BIDEN. Beyond that, what I really worry about is the argument that says the President is being political—and he clearly is, and he has a right to be, I guess. And therefore, we have a right, under the Constitution as I read it and constitutional history.

For example, George Washington's Chief Justice Rutledge, Nominee Mr. Rutledge was rejected by the U.S. Senate. This is not a new notion.

But what worries me is if we start to get into saying because the President can choose ideology and the person that he wants, we in fact should make ideological judgments here. And I worry about the symbol. We are talking symbols here. I worry that what may happen is that if it gets down—if the public ever perceives that it in fact it is really nothing more than a political struggle between a President and the Congress, between two political parties, the people of the Court are persons who in fact are nothing more than reflections of one ideology over another, then I think that that citadel of justice—I will never forget Clarence Mitchell's father sitting before us describing with obviously heartfelt and deeply felt meaning the Supreme Court of the United States as the citadel of justice and the place at which people could go and so on. And he talked about what would happen if that changed, if the cobwebs began to grow in the hallways. It was the most moving speech I have heard in this Chamber.

And I worry that if we let it get down to that, that although constitutionally that may be able to be done, it would be a real serious, serious blow for justice for this country, the perception of it.

Mr. WEISS. In this situation, Senator, you do not have that problem.

Senator BIDEN. I am not suggesting I do. I want to make sure I understand what you all are saying, so that when you leave here, it is not suggested that the reason why you are opposing Justice Rehnquist—if in fact it is not the reason—is merely because you disagree with his philosophy, which is a mainstream philosophy, but because you believe that his philosophy and his application of his philosophy as a judge is so on the outer edge of the accepted bounds of the American political system that he warrants not being on the Court. There are two different questions.

And there are very bright women and men who make the argument that in fact you do not have to do that. You just established you disagree with him, and a U.S. Senator, if you disagree with the philosophy and their voting record, vote against him. I acknowledge that has a constitutional basis. I think it is a political weakness, and that is the only reason for my asking the question.

Ms. SIMMONS. I think it should be considered in the context of all the other things.

Senator BIDEN. Agreed.

Ms. SIMMONS. And I hope we do not lean over so far backwards that we rule that out because we are afraid the opposition might say something different.

Senator BIDEN. No, and clearly the administration will not rule it out.

Ms. SMEAL. Senator, on ideology, I think that what we are talking about is not in ordinary terms Republican or Democrat. It goes way beyond partisan politics. This is ideology in its truest sense of judicial beliefs of what do you believe the words due process, equal protection, is there a right to privacy in the Constitution, what is the role of women in the Constitution, how does sex discrimination—how can it be defended under our current laws without an equal rights amendment. These to me are the questions that should be asked.

Senator Biden. I think they are legitimate questions, and I think you asking him, highlight them. I find, quite frankly, that if one claims they are a strict constructionist, I can understand that. If they are literalists like the Attorney General, for example, says he is, but if one suggests they are strict constructionists and then goes behind the face of the words to find meaning in what the framers meant—which is also a legitimate exercise of those who are more the legal realist—if you do that, you go behind the face of the words of the Constitution, then it seems to me we can get to look at what you say.

My confusion in the decision for me is in part going to determine, I am going back and rereading Mr. Justice Rehnquist's cases as it relates to his discussion with me yesterday on the 14th amendment. He acknowledges that this says all persons, and then he acknowledges that you have a different standard to determine within that.

Now, if he is a strict constructionist, how do you get to that point? How do you get to acknowledging there is a different standard? That is my question. I have got to do a little more research on that. It is clear he puts the highest burden—he puts women and corporations in the same category, literally, not figuratively—literally. And he puts blacks in the highest category, and he puts other racism minorities probably most of the time in that category, but he would not speak to that specifically.

So I have to check, go back and look at it. I thank the Chair. I realize we have to move on. I thank the witnesses for taking the time. You have made a valuable contribution.

Senator DeConcini. Mr. Chairman.

Senator Hatch. Senator DeConcini.

Senator DeConcini. May I just follow up? I got here late, and that is why I did not ask any questions. I wanted to listen to the testimony here, and I appreciate the line of questioning, particularly that the Senator from Delaware has pursued, because I think it is important here, and I know that this is not the hearing for Judge Scalia. But, Ms. Simmons, do you know what the NAACP will do regarding his nomination?

Ms. Simmons. We are in the process now of going over his record to see whether or not we wish to testify.

Senator DeConcini. So you do not know whether you are going to support him or oppose him?

Ms. Simmons. I do not know as yet.

Senator DeConcini. Ms. Smeal?

Ms. Smeal. We are going to oppose.

Senator DeConcini. You are going to oppose him. On the philosophical grounds, I presume?

Ms. Smeal. Yes. We think that his record obviously is not as extensive as Justice Rehnquist's, but in the legal record that we have, it is even worse on women's rights.

Senator DeConcini. Than Justice Rehnquist's?

Ms. Smeal. And we can document that.

Senator DeConcini. Congressman?

Mr. Weiss. We will be opposing him.

Senator DECONCINI. You will be opposing?

Mr. WEISS. Yes.

Senator DECONCINI. Mr. Mitchell?

The CHAIRMAN. On the next panel.

Mr. MITCHELL. We have not taken a position, but I have not testified.

Senator DECONCINI. I take it from this exchange this morning—and I am sorry that I missed your statements. I am going to read them, I can assure you—that obviously in this selection process, and I suspect that this goes not only to the Supreme Court but to the circuit court of appeals and to the district courts, that each of you and the organizations that you represent believe that the philosophical approach of a Justice and that performance, if they have experience in that on the Court, rather than the quality of his or her ability to write and to interpret or experience in practice of law is more important. Is that fair, my observation here for each of you?

Ms. SMEAL. It should go without saying that whoever we are appointing to this high position can write and can understand the law and is qualified in the skills. This goes to their positions.

Senator DECONCINI. Well, if you had a judge who had 15, 20 years on the bench who met all those qualifications, that is not enough to overcome an ideological difference. Is that fair to say in your judgment?

Ms. SIMMONS. I think that ideology is important. I think ideology alone should not be the standard.

Senator DECONCINI. Excuse me, Ms. Simmons?

Ms. SIMMONS. Ideology alone should not be it.

Senator DECONCINI. Should not be the standard separately.

Ms. SIMMONS. That is right. All those things go into the hopper when you are talking in terms of the person who will be leading the Court.

Senator DECONCINI. Right, based on a scale of 1 to 4, 1 to 10, whatever it is, where would you place ideology? No. 1?

Ms. SIMMONS. I had not thought about it that way.

Senator DECONCINI. Ms. Smeal?

Ms. SMEAL. Well, I think what you believe on due process, equal protection, and justice is very important.

Senator DECONCINI. I do, too.

Ms. SMEAL. And I would say of the high importance. I also happen to think behavior and record is important, too, and when I said that, I did not mean to be flippant when I said one should assume a person at this highest capacity is good at writing legal opinions and interpreting them.

But I think that there is a lot of questions on this appointment. One is how he views individual rights. I do not think one of the things we even mentioned was how he views the power of the majority. He essentially does not see a guarantee of minority rights. He views that minority rights are what the majority says they are, which I think is contrary to our history.

Senator DECONCINI. Let me get back to my question, if I can. I take it from your answer that you feel this ideology or belief or philosophy is the highest of the criterias, if you want to segregate them?

Ms. SMEAL. Yes, I do, but I also happen to think on this one his behavior is also very important.

Senator DECONCINI. I understand.

Ms. SMEAL. I happen to believe his behavior in Arizona and——

Senator DECONCINI. I got that. I am trying to distinguish myself, quite frankly, because I have somewhat felt that the qualifications and capabilities of individuals should be first. And your testimony is helpful, quite frankly.

How about you?

Mr. WEISS. If the ideology, Senator, is so strong that it distorts and colors and directs the decisions, then it must be given strong consideration. That is what has happened, I think, in Justice Rehnquist's case. It is not just abstract ideology. He has taken the ideology that he displayed in private practice, and used it in his work as a member of the Department of Justice and as a Supreme Court Justice. However he has to shape his decisions on the court, he comes out where he was philosophically and ideologically before he ever became a Supreme Court Justice.

Senator DECONCINI. And you would apply that same standard if it was far to the left?

Mr. WEISS. I think that is absolutely right. If in fact he used that to come to decisions before—looking at what the facts are and what the law is.

Senator DECONCINI. In other words, if you had a Justice or a person nominated who had taken what you consider—it might differ as to what is considered far left positions involving the Communist involvement in our society or something that maybe you and I would not agree, you would think that would be an ideological prohibition, too?

Mr. WEISS. Within the bounds of the Constitution. If the Constitution says that people have the right of free speech and free assembly and free association, no matter who they are, then you cannot say, well, if you are a Communist, you cannot do that.

Senator DECONCINI. No; but if they were involved in treason and there was evidence there and you have to interpret the Constitution not to include that as——

Mr. WEISS. Absolutely right. That is right.

Senator DECONCINI. You would feel that that ideology, let us say it is on the left—maybe it would be interpreted to be on the right—but let us say it is on the left, that would be the No. 1 criteria, too, in your judgment?

Mr. WEISS. I think so. That is right.

Senator DECONCINI. Thank you. Mr. Mitchell, do you care to comment?

Mr. MITCHELL. Senator, I have not been sworn yet, and I am part of the next panel.

Senator DECONCINI. I am sorry. I thought you were part of this.

Senator HATCH. We are going to have him on the next panel, Senator.

Senator DECONCINI. Thank you. I have no further questions.

Ms. SMEAL. Senator, when you said about competency, just think of yourself as a person who would be defending minority rights. It would be better to have an incompetent opponent than an extremely brilliant opponent. So for those of us concerned about individual rights, that he is supposed to be so brilliant only makes a person who would be more skillful in denying individual rights.

Senator DECONCINI. Well, Ms. Smeal, let me just say in my judgment that this is not always the case. But I think in my limited experience of a few years of practice and in business and in life that people who do have good intellect, capability of reading and reasoning, even if I happen to disagree with that reasoning, also have the capacity often to come to conclusions that I may agree with one day and disagree with another day. And I think we have had some history on the Supreme Court where we have had some surprises based on what we thought.

And you mentioned Justice Stevens. I am not equating that to Justice Rehnquist because they both have sat there, and you have testified that he has not made that transition or change. But it seems to me like you are better off with someone who is intelligent and going to read the law and study it, because maybe you have got some hope of persuading him, assuming that they are there before you with your case.

Thank you, Mr. Chairman.

Senator HATCH. Thank you. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Ms. Smeal, as I understand it, your comments on behavior are focusing on the issues relating to Justice Rehnquist's conduct as a poll-watcher, correct?

Ms. SMEAL. Yes.

Senator SPECTER. Is there anything else that you focus on specifically?

Ms. SMEAL. Well, in my testimony, my public testimony here, I have focused primarily on sex discrimination and his record on sex discrimination and his interpretation which has been very restrictive. But we do mention that we are concerned also with his whole question when he was in the Office of Legal Counsel, the *Laird* v. *Tatum* decision which he did not recuse himself from. It troubles us, you know. He talks about the young barbarian on the campuses during the late 1960's and early 1970's. Remember, that is the birth of not only tremendous activity for peace in our country, but tremendous activity for women's rights in our country. And I do not understand why this executive privilege would stop us from seeing these legal memorandums that he wrote. From a woman and a person who has been—I have been on the forefront of the fight for individual rights. At various times, I believe, through government documents that NOW has gotten through the Freedom of Information Act that we have been wiretapped, that our loyalty has been questioned, even though the only thing we have ever really pushed is fuller rights for women.

I would like to know more about his record vis-a-vis what he advised the Nixon Department of Justice in wiretapping and how he treated, I believe, groups like us that were, I think, in the finest tradition, really, of advancing individual liberties in our country.

Senator SPECTER. Thus, when you talk about behavior, you are talking about more than the poll-watching activity.

Ms. SMEAL. Yes, I am.

Senator SPECTER. You are referring to his failure to recuse himself from the case, *Laird* v. *Tatum*.

Ms. **Smeal**. Right, and I am also talking about what did he do in the Justice Department as Assistant Attorney General and for the Office of Legal Counsel in those days.

I do not know that whole record, but I do know he did not recuse himself. I do know that the Justice Department had a vigorous record of doing some questionable things.

Senator **Spector**. Do you have any specific reason to believe that he was personally involved in any of the activities relating to the wiretap issue?

Ms. **Smeal**. The only thing I know is I guess what I read in the newspapers, but I would feel a whole lot better if the Senate and the public could see his memorandum of that time.

And when I said a whole pattern of behavior, though, I was really referring to the public pattern. And we all know from the earliest days as a law clerk through his practice as an attorney, through that ballot thing, that he tended to be on the side of those fighting against minority rights and fighting really to justify patterns of segregation which I think are not justifiable.

Senator **Specter**. Ms. Smeal, if those records were available and it was determined that Justice Rehnquist was not involved in any of the activities that you have described, such as wiretapping or other activities you consider to be repressive, would that change your ultimate conclusion as to opposing his nomination for Chief Justice?

Ms. **Smeal**. I think that all of us would feel better if we could see those papers. You know, I stand on my testimony that I think ideology and his beliefs on women's rights and minority rights and individual rights, his record as a Justice is the most important.

But when they are trying to say is it the only thing, I do not think it is the only thing. There is a pattern of behavior, some of which I find that we know I find questionable; the other I do not know and think that we as a public have a right to know.

Senator **Specter**. It would not necessarily change your ultimate conclusion, but you think, as a matter of public record and as a matter of fairness, that it ought to be before the Senate and the people.

Ms. **Smeal**. Right.

Senator **Specter**. Ms. Simmons, how heavily do you weigh the issue of the poll-watching activities? I ask you that because, as of this moment, we have not heard from those witnesses although we are about to. One of the items that weighs on this committee is an evaluation on credibility. Mr. Justice Rehnquist has denied the charges as they have been relayed to him from affidavits. Now we have to hear from the people who were directly involved to see precisely what it is they have to say and the quality of their recollections, since the activities took place so long ago.

My question to you is, how heavily do you weigh those accusations with regard to the position you have taken in opposition to Justice Rehnquist?

Ms. **Simmons**. I think they should be weighed heavily, Senator, and I will tell you why. Last time we had affidavits from persons who had actually witnessed conduct, and you recall in the report of the committee they indicated that was wholly unsubstantiated.

This time I also called and spoke to a number of those persons whose affidavits we put in in 1971, and they reaffirmed what they had said at that time. The Reverend G. Benjamin Brooks, the former Senator Cloves Campbell.

In addition to that, as I said earlier this morning, I was field director for Arizona for NAACP in southern California at the time. In addition to that, I was on special assignment directing our national voter registration/voter education campaign.

So I had coming into my office the same information as was put in the record in 1971 with reference to the complaint about Mr. Rehnquist and the poll watching incident in addition to other incidents about the Public Accommodations Act.

I think that this is important because it actually starts us seeing the man, and when you take a look at the poll watching incident, you take a look at his conduct with reference to the city council and Public Accommodations Law, the Civil Rights march on the Capitol, what he said according to Senator Cloves Campbell that he opposed all Civil Rights laws, then you take a look at his decisions, that pattern emerges crystal clear.

And another thing, I think that the right to vote is so basic for black Americans that we perceive this as something truly fundamental, and therefore we put a lot of weight on that. We think this committee ought to and to look in the context of how he has emerged from that time to where he is today.

Senator SPECTER. Ms. Simmons, were you the field representative in Arizona at the time these poll-watching incidents occurred?

Ms. SIMMONS. Yes, I was field representative for Arizona and southern California and Nevada.

Senator SPECTER. What years did you hold that position?

Ms. SIMMONS. 1961 through 1965.

Senator SPECTER. Did you have occasion to talk to these people personally at that time?

Ms. SIMMONS. I did, sir.

Senator SPECTER. About how many of them?

Ms. SIMMONS. Senator Cloves Campbell at that time, the Reverend G. Benjamin Brooks who had led our branch there for a number of years, and they had sent in—since I was doing the massive voter registration campaign as a special assignment, we were concerned about denials of the right to vote, and we had gotten a lot of complaints in.

So I had that kind of firsthand contact.

Senator SPECTER. So your conversations with those people were contemporaneous with the events?

Ms. SIMMONS. That is correct, sir.

Senator SPECTER. Congressman Weiss, a question or two for you. The discretion and authority of the President in making Supreme Court nominations, including nominating the Chief Justice, is a very major concern here.

The President, presumably, has made a very careful choice. These matters are all before him and before his advisers. As a veteran of the political process, what is your view as to the weight this committee and the Senate ought to give to his discretion and his authority in this matter?

Mr. Weiss. Senator, 15 years ago, Mr. Joseph Rauh, who I believe is with us today, testified on behalf of the ADA and included in the record an article written by Prof. Charles Black in which Professor Black shows the rights of the Senate to be equal to those of the President in approving judicial appointees on the "advice and consent" grounds.

So it seems to me that the Senate has the full right to look totally at the merits of the nomination, whether it is for the Associate Justice or for the Chief Justice of the Supreme Court. I think that the Senate has demonstrated over the years, as have most American organizations, that all other things being equal, they will accept an approved recommendation of the President. But historically that has not always been the case, and I believe that you have to balance the desire to defer to the President with the Senate's own constitutional obligations and review what the role of that nominee will be in the years and decades ahead in the very important position that he or she has been nominated for.

Senator Heflin had, before you arrived, asked how we would view the nomination of Justice Rehnquist assuming that there were a couple of other changes that would take place during President Reagan's term of office.

And it really starts you thinking about the importance of the Rehnquist nomination in a Court composed differently than it is right now. So I think that you have the right to really look at the totality of Justice Rehnquist, his behavior, his background, his decisions, his philosophy and what you expect American society to be when he assumes that position.

Senator Specter. You are saying that you would disagree with those who say that there is wide discretion. You would say that it is not discretionary at all, that the Senate has equal status with the President through the Senate's advice and consent responsibility under the Constitution.

Mr. Weiss. The President has wide discretion to nominate. You have equally wide discretion to determine whether, in fact, you are going to confirm that nomination.

Senator Specter. Well, he does not have wide discretion to nominate. He has the absolute power to nominate. There is no question about that.

Mr Weiss. That is about as wide as you can get.

Senator Specter. No, I do not think so. It is not discretionary at all. It is absolute. When you talk about discretion in the law, there is the doctrine of abuse of discretion, so that discretion means that you have latitude but there are bounds to latitude.

But the question I pose is, do you think that we are on equal terms with the President, that we ought to have as much to say about a Supreme Court nominee or the designation of the Chief Justice as does the President.

Mr. Weiss. It is my understanding, and it has perhaps not been as deep a reading as Senator Biden's, for example, that originally the constitutional framers wanted to give the power to appoint Supreme Court justices to the Senate, and that ultimately they compromised to establish the current system.

So, yes, I think that the Senate has equal power in that determination

Senator HATCH. Some of the framers, not all of them, or it would be in the Constitution.

Senator BIDEN. Mr. Chairman, may I make a comment?

Senator SPECTER. May I proceed? I just have another question or two.

Senator HATCH. Yes.

Senator BIDEN. The reason I say it is the chairman has told us that the witnesses that we have called in opposition are limited to a total of 4 hours. We have been on the same panel almost 2 hours now, and we have another 10 witnesses, and I know the chairman is big hearted but I doubt whether he is going to come in and tell us we have more time, and so that is the reason I say it. I am anxious to hear the question but if the answers could be shorter.

Senator SPECTER. I have a brief question. These proceedings obviously have very heavy political overtones, and the President has made his nomination in the face of the 1984 election returns.

Do you think, notwithstanding that, that the Senate and President are on equal grounds as to their roles in this selection. I ask you that as a very experienced person in political life.

Mr. WEISS. I was elected the same time the President was, and it seems to me that my constituents did not say, OK, because the President was elected we do not expect you to exercise your independent judgment and thought. I think that the Senate is in the same position.

Senator SPECTER. Well, we were all elected, too, that is true.

Thank you very much, Mr. Chairman.

Senator HATCH. Thank you, Senator Specter.

Senator Grassley, do you have any questions?

Senator GRASSLEY. I have no questions of this panel.

Senator HATCH. Thank you very much. Are there any further questions?

[No response.]

Senator HATCH. Let me just take a minute and make a couple of comments. Congressman Weiss, we are happy to welcome you and the others here.

In regard to dissenting in the last four terms we have built a pretty good record, but you are incorrect with regard to Rehnquist even being the lone dissenter. Within the last four terms Justice Rehnquist has written 73 opinions of the Court. That is more than any other single Justice.

He is writing an awful lot of the majority opinions today and is in the majority in many ways. I understand how you feel about that. In regard to civil rights and women's rights, I might add Ms. Smeal, that you indicated that he basically does nothing for women, especially with regard to sex discrimination. However, during the last term he wrote the leading sex discrimination case or at least the sex harassment case in the workplace.

He also joined the majority in the *Roberts* v. *Jaycees* case that prohibited sex discrimination by a club. I do not want to go through all the cases, but there is also the *Hamm* v. *South Carolina, Law* v. *Nichols*, and *Palmer* v. *Sadaty.*

He decided that a State could not remove a child from a mother who was married to a black man. Something that should not have been done, but was done. *White* v. *Register*, one of the all time important voting rights decision cases struck down a Texas at large voting plan as unconstitutional because it would have diluted minority strength.

And you could go through case after case. I understand your point. You disagree with a lot of the cases. You have every right to do so. But on the other hand, let us recognize that his record like all Supreme Court Justices is one that cuts across the board.

I find fault with some of his decisions, but I also find fault with their decisions from time to time, too. It is just natural that we differ on these things. That is why it is such a great institution because there is a wide disparity of belief in certain areas, yet there are matters they all agree on. *Brown* v. *Board of Education* is one of them.

Let me end it with that statement. We will call the next panel.

Ms. SIMMONS. Mr. Chairman, may I, please?

Senator HATCH. Yes.

Ms. SIMMONS. I note that I inadvertently gave a wrong name in answer to a question. May I change that, please?

Senator HATCH. Surely.

Ms. SIMMONS. I talked to Mr. Robert Tate, not Jordan Harris. I could not find Jordan Harris.

Senator HATCH. That is fine. We will correct the record. Thank you for coming. We appreciate your being here.

Senator KENNEDY. Mr. Chairman, not to take the time of the committee now, but can they give a response to that last question. Could they file that for the record? I think it is important.

Senator HATCH. Yes We will keep the record open.

[Not available at press time.]

Senator HATCH. Mr. Mitchell, we are sorry you had to sit there and wait. We appreciate you being here. We are going to call Clarence Mitchell III, who is president of the National Black Caucus of State Legislators. Ms. Elaine Jones, the associate legal counsel for the Legal Defense Fund out of New York, NY. Mr. Benjamin Hooks who is chairman of the Leadership Conference on Civil Rights here in Washington, DC, and Ms. Estelle Rogers, who is with the Federation of Women Lawyers from New York, NY. Also, Mr. Joseph Rauh, attorney practicing here in Washington.

Do you all swear to tell the whole truth and nothing but the truth, so help you God?

Mr. MITCHELL. I do.

Ms. JONES. I do.

Ms. ROGERS. I do.

Mr. HOOKS. I do.

Mr. RAUH. I do.

Senator HATCH. Thank you. Mr. Mitchell, we will begin with you. We are going to be pretty tight on the time allotted each witness.

Senator BIDEN. Mr. Chairman, before we begin, I would like to suggest that we limit on the first round our questions to 5 minutes—our questions to 5 minutes on the first round.

Senator HATCH. On this panel.

Senator BIDEN. On this panel.

Senator HATCH. That will be fine. Is there any objection?

[No response.]

Senator HATCH. We are limiting the testimony to 3 minutes. However, we will be fair to everybody.

Mr. Mitchell, we will begin with you.

TESTIMONY OF A PANEL CONSISTING OF: CLARENCE MITCHELL III, PRESIDENT, NATIONAL BLACK CAUCUS OF STATE LEGISLATORS, WASHINGTON, DC; ELAINE JONES, ASSOCIATE LEGAL COUNSEL, LEGAL DEFENSE FUND, NEW YORK, NY; ESTELLE ROGERS, LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ORGANIZATION FOR WOMEN, NEW YORK, NY; BENJAMIN L. HOOKS, CHAIRPERSON, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, WASHINGTON, DC; AND JOSEPH RAUH, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. MITCHELL. Mr. Chairman and distinguished members of the Senate Judiciary Committee, my name is Clarence Mitchell III. I have been a Maryland State legislator for 24 years, all of my adult life, and I testify today as president of the National Black Caucus of State Legislators on the nomination of Associate Justice William Rehnquist to be Chief Justice of the United States.

I come to you with certain deep emotions because it was not too long ago that I sat in a room like this while my father, the late Clarence Mitchell, Jr., testified before this committee in opposition to the nominations of supposed Justices Haynesworth and Carswell.

And I come to you in certainly a spirit of optimism because my father had such great faith in the ability of the U.S. Senate to respond in justice and in fair responses when conditions were perceived to be unfair.

The National Black Caucus of State Legislators, an organization of some 396 black State legislators from 42 States, opposes this nomination because Mr. Justice Rehnquist's entire public career, both on the Court and off the Court, demonstrates unmitigated hostility to the interest of minority Americans.

Even the perception of this Justice's actions leads us to believe that he is racist, that he is antifemale, and that it sends a dangerous message to black America if this committee confirms that appointment.

It sends a dangerous message at a time when we are in the forefront of efforts on South Africa to end apartheid in South Africa, when across the length and breadth of judicial appointments over the last few years a very subtle message is being sent that black America can no longer begin to rely on the Federal courts for relief; that women can no longer rely on the Federal courts for relief.

I commend this committee for the action you took in rejecting the nomination of Jefferson Beauregard Sessions III, who used the tools of the Justice Department to harass blacks in the Black Belt of Alabama—black elected officials, black civil rights leaders—in an effort to intimidate the overwhelming turnout of blacks in those areas just when they were beginning to make progress.

I suggest to you that this appointment is just as dangerous. I suggest to you that the perception of the Chief Justice is important.

Had it not been important, I suggest Abe Fortas would have been the Chief Justice of the Supreme Court.

I say to you perception is important and you ought to know whether or not a Justice—how a Justice feels on the presumption of innocence when the U.S. Attorney General suggests that the presumption of innocence in this country, the very foundation of the building of this country, ought to be done away with.

My written statement is here. I apologize for going over. I have been in and out over the last 3 days because we consider this to be a very important nomination.

Senator HATCH. We understand.

Mr. MITCHELL. Thank you

[The prepared statement follows:]

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TESTIMONY OF

CLARENCE M. MITCHELL, III, PRESIDENT

NATIONAL BLACK CAUCUS OF STATE LEGISLATORS

before the

COMMITTEE ON THE JUDICIARY

UNITED STATE SENATE

on the confirmation of

WILLIAM H. REHNQUIST

to be Chief Justice of the United States

July 29, 1986

NBCSL

"A National Network For Political Equality!"

Mr. Chairman and Members of the Judiciary Committee:

My name is Clarence M. Mitchell, III, and I testify today on behalf of the National Black Caucus of State Legislators on the nomination of Associate Justice William Rehnquist to be Chief Justice of the United States.

The National Black Caucus of State Legislators opposes the nomination of Associate Justice Rehnquist to be the Chief Justice of the United States. We take this extraordinary position because Mr. Justice Rehnquist's entire public career both on the Court and off demonstrates unmitigated hostility to the interests of minority Americans.

Before I get into the specific reasons why Mr. Justice Rehnquist should not be confirmed, I want this Committee and the full United States Senate to understand how black citizens feel about the institution of the Supreme Court.

For most white Americans the only court they encounter in their entire lives is the traffic court or the small claims court. Only rarely do decisions of state and federal courts affect them personally. For black Americans, the most fundamental questions affecting our daily existence -- even decisions about whether we are persons or property -- are decided by the Supreme Court. It is that Court to which we have turned time and time again over the course of history for judgments on where we can live and go to school, where we can eat and travel, the extent of our political rights, our access to jobs and thus our very economic existence. Save possibly for American Indians, I doubt that there is any other group of Americans so directly touched by this institution.

Who sits on the Supreme Court in judgment over our lives is therefore of enormous importance to us. In his 15 years on the Court, Justice Rehnquist has consistently voted against the claims of minorities. He has shown a persistent refusal to recognize the deep roots of racism in American life and to permit the federal courts the tools to remedy past racial discrimination and its continuing effects.

Evidence of his hostility of our rights is also apparent in Mr. Rehnquist's private life in Phoenix, Arizona, before he came to the Court. This Committee ought truly to regret that it did not fully examine in 1971 the allegations that are now surfacing about Mr. Rehnquist's purported role in harassing black and Hispanic voters at the polls in the early 1960's. But you can rectify that unfortunate error in these hearings. It would be a shame if this Committee brushed off these charges on the grounds that, even if true, Mr. Rehnquist's activities happened so long ago and have been dimmed by his "brilliant" scholarship and judicial service. And the Senate of the United States should not confirm as Chief Justice a man who is not fully forthcoming in defending himself against the testimony of personal witnesses that he did intimidate minority voters.

Were these allegations about interference with minority voting rights the only cloud hanging over this nomination, they would be serious enough. But Mr. Justice Rehnquist publicly espoused opposition to a public accommodation ordinance and school desegregation in Phoenix 22 years ago. While he disavowed his earlier position at the time of his confirmation hearing in 1971, the reasoning for his original positions continues to haunt black citizens.

The record shows that Mr. Rehnquist testified in opposition to a public accommodation ordinance before the Phoenix City Council on June 15, 1964. After the City Council unanimously passed the ordinance, Mr. Rehnquist wrote a letter to the editor of the Arizona Republic which was published on June 21, 1964. Mr. Rehnquist distinguished between the power of government to interfere with the rights of private property owners in such "orthodox" matters as zoning, health and safety regulations and the power of government to require private proprietors of public facilities to serve all without regard to race. The former he favored; the latter he opposed by reference to some "historic right" of owners to choose their own customers. Black Americans are offended by this notion that the cleanliness of an eating establishment is more important than the skin color of the person who orders a meal. We well remember that time when black Americans were arrested and jailed for challenging that "historic right" of proprietors to refuse us service.

On the matter of racially segregated schools in Phoenix, Mr. Rehnquist wrote a letter to the Arizona Republic dated September 9, 1967 opposing integration proposals and defending the neighborhood school concept "which has served us well for countless years." That letter contains an astounding statement that "we are no more dedicated to an 'integrated' society than we are to a 'segregated' society; that we are instead dedicated to a free society...." A free society for whom, I would ask. That sentiment bespeaks an attitude that the white majority's free society is to be valued above the aspirations of minority citizens to be full-fledged and equal partners in that society.

Now you may say to me, Senators, "Why Mr. Mitchell, do you not admit of the capacity of a man to change his mind? Do you forever hold against Mr. Rehnquist the positions he took in the 1960's?" My answer, Senators, is that he may have changed his positions on these issues, and even his rationale. But it is the way in which he balances competing interests on great public questions of the day which bothers me the most. After all, we have a 15-year record of his votes as a Justice of the Supreme Court on civil rights cases to show how he continues to balance those interests.

I leave to my fellow panelists the legal analysis of Mr. Justice Rehnquist's decisions in civil rights cases.

I thank you for the opportunity to testify.

Senator HATCH. We will put all statements in the record as though fully delivered. We will make sure the record is open for additional comments.

Ms. Jones, we will turn to you.

Ms. JONES. Thank you, Senator Hatch, for indicating that my statement will be made part of the record.

Senator HATCH. It will.

STATEMENT OF ELAINE JONES

Ms. JONES. And I just want to indicate that the Legal Defense Fund is well aware that *Rogers* v. *Lawrence* was a constitutional case and not based on the statute, section 2. So with that amendment, I want our statement accepted in the record.

Senator HATCH. Without objection, that will be fine.

Ms. JONES. You know, I think it will be more productive for me to take my 3 minutes and really address some of the concerns that the Senators seem to have been raising over the course of the past couple of days.

I mean, you—others, you know, have talked about the continuum, how Mr. Rehnquist and how law clerk Rehnquist and lawyer Rehnquist and Justice Rehnquist are all part of a continuum.

But, you know, you have asked the question about symbol; you know, what kind of symbol would he make. And I have been trying to give some thought to that because the term—it is hard to explain because a lot of these values are amorphous that we are trying to explain to you

And I thought that an explanation might be, in our Nation, that the Chief Justice is the human symbol of the scales of justice; that is what he is; that is what he is. That is the perception.

And it would also, I dare say, be the feeling in the large majority of the black community that with Mr. Rehnquist as the Chief, that those scales would appear to be tipped.

Now, the question has come up about dissent, how many dissents. I do not think the issue is one of the number of dissents. I think the issue is one of the positions that Mr. Justice Rehnquist has been taking in these cases.

Now, we can look at Bob Jones, you know, and we can look at *Batson* v. *Kentucky*. Now, look at Bob Jones. Certainly, that was dissent. That is not the issue. The Chief Justice of the United States, Mr. Justice Burger, authored that decision.

Now, there are certain kinds of cases that come before the Court that make it clear that we do need a consensus builder on the Court.

Brown v. *Ford* was such a case. What is a consensus builder? What does it take for the Chief to build that consensus? The consensus builder, in my view, means taking Justices who have different points of views and who are from all over the range, and sitting down, finding out areas of agreement, fashioning and crafting an opinion that brings the Nation behind that opinion. And give us the understanding that the opinion we need to respect and follow, and it is an especially important and difficult decision.

In Mr. Justice Rehnquist's case, that's not the kind of consensus builder he would be. For Mr. Justice Rehnquist to build a consensus, he has to have other Justices who think as he thinks. That is quite different.

Senator **Hatch**. Ms. Jones, your time has expired.

Ms. **Jones**. Well, thank you very much.

Senator **Hatch**. Thank you.

[Statement follows:]

Legal Defense Fund

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TESTIMONY OF

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NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

before the

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

on the confirmation of

WILLIAM H. REHNQUIST

to be Chief Justice of the United States

July 29, 1986

Contributions are deductible for U.S. income tax purposes

The NAACP LEGAL DEFENSE & EDUCATIONAL FUND is not part of the National Association for the Advancement of Colored People although it was founded by it and shares its commitment to equal rights. LDF has had for over 25 years a separate Board, program, staff, office and budget.

I appreciate the opportunity to be present today to express the views of the NAACP Legal Defense and Educational Fund, Inc. concerning the nomination of Justice Rehnquist to be Chief Justice of the United States. As the Committee may be aware, the Legal Defense Fund has appeared before the Supreme Court in civil rights cases with considerable frequency over the last four decades -- from an era that pre-dates Brown v. Board of Education by many years, through Brown and its companion cases, right up to the Term that has just concluded. Over the course of those years, we have developed a seasoned and tempered perspective on the institution, the function of the Chief Justice, and the views and voting records of nearly two generations of justices. From that perspective we are convinced that Justice Rehnquist should not be confirmed for the position of Chief Justice.

We, of course, are advocates. Our institutional purpose has been to advance the course of civil rights through use of the tools of the American legal process, and to do so as aggressively and successfully as we can. We expect similar zeal of our adversaries and, in our professional capacities enjoy serious, principled debate. Lawyers in private practice are advocates, but once appointed to the bench as judges, they have an obligation to put advocacy aside and to weigh fairly competing considerations. In civil rights cases, Justice Rehnquist does not meet this standard. While one may ask too much for a judge to shed his or her life's experiences when donning the robes, it hardly asks enough that the judge come to each case with an open mind, a willing ear and the inclination to reach a fair result based on all the circumstances. These qualities are more than desirable; the judicial system in a free society depends on them.

If this is important in any judge, it is especially so in the Chief Justice. Surely these qualities of fairness, openmindedness and level judgment are of both practical and symbolic significance in the leader of the federal judiciary and the head of the third participant in the task of shaping national policy. In our opinion, the nominee's views on the civil rights of black Americans are so unfavorable, so rooted and so intractable as to dispossess him of the qualities I have mentioned when he confronts civil rights cases. For that reason, the Legal Defense Fund urges the Senate to reject this confirmation.[1]

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[1] At the outset, I want to emphasize that this Committee has the right and indeed the responsibility to inquire into the views of the nominee. In an article which appeared in the Harvard Law Record of October 8, 1959, Mr. Rehnquist himself stated that the Senate must discharge its duty "of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him." The article criticized the Senate for confirming Justice Charles Whittaker without such an inquiry, and placed particular emphasis on the Senate's failure to examine Mr. Whittaker's views on the then recently decided case of Brown v. Board of Education. I might add that the article, while not explicitly attacking Brown, did not exactly brim with enthusiasm for the Supreme Court's decision in that historic case.

Not long ago, the Chairman of this Committee stated as follows:

> [I]t is my contention that the Supreme Court has assumed such a powerful role as a policy maker in the government that the Senate must necessarily be concerned with the views of the prospective Justices or Chief Justices as they relate to broad issues confronting the American people, and the role of the Court in

The earliest record we have of Mr. Rehnquist's views on the subject of civil rights are the memoranda he wrote in 1952-53 as a clerk to Supreme Court Justice Robert H. Jackson. As the committee may recall, Mr. Rehnquist wrote a memorandum supporting the doctrine of "separate but equal" and urging that the landmark Brown case be decided the other way. And though I gather that once before this Committee he disavowed personal adherence to some of the views expressed in that memo, I urge the Committee to study closely the writings of respected historians such as Richard Kluger and Dennis Hutchinson who have logically and persuasively drawn the truth of that disclaimer into serious question. It is also by no means clear from the ensuing record that Mr. Rehnquist has disavowed all of the views contained in that memorandum. Those views -- that the Court cannot and should

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dealing with these issues.

Senator Thurmond spoke those words in July 1968, at the hearing of this Committee concerning the nomination of Associate Justice Abe Fortas to be Chief Justice. This Committee and the entire Senate should and must closely examine Justice Rehnquist's views before voting upon his nomination as Chief Justice of the United States.

not strive to protect the rights of minorities, that the minority has only those rights which the majority bothers to tolerate, and that personal rights are no more sacrosanct than property rights -- have been expressed by Mr. Rehnquist on many other occasions, both before he was appointed to the Court and in many of his opinions on the Court.

For example, during his clerkship with Justice Jackson, Mr. Rehnquist authored two memoranda, remarkably similar in tone, style and content to the Brown memo, urging rejection of a challenge by black Texas citizens to a purportedly "private" democratic primary in which only white citizens were allowed to participate. In one of those memos Mr. Rehnquist criticized the Executive Director of the NAACP and Justices Black and Douglas for being unduly critical of southerners, and stated: "I take a dim view of this pathological search for discrimination" -- which was at least a poorly informed perspective on reality in 1953. In a second memo on the same case, Mr. Rehnquist stated the following:

> It is about time the Court faced the fact that white people in the South don't like the colored people; the constitution... most assuredly did not appoint the Court as a societal watchdog to rear up every time private discrimination raises its admittedly ugly head. To the extent that this decision advances the frontiers of state action and "social gain," it pushes back the frontiers of freedom of association and majority rule.

Needless to say, Justice Jackson did not adopt this view, joined seven other Justices in voting to invalidate the all-white primary. Terry v. Adams, 345 U.S. 461 (1953). More enlightening for the present purposes is the connection between the views of the young clerk and the behavior of the Phoenix practitioner. I am certain everyone here is aware of the well-documented reports of Mr. Rehnquist's harassment of Black voters at a local Phoenix polling place. I submit to you that his disrespect for the rights of those Black voters has roots in his Terry memoranda, and represents part of a continuum of outlook which informs his judgment on the Court today.

Mr. Rehnquist's apparent hostility to civil rights was not limited to school integration or voting contexts. While in private practice in Phoenix in 1964, Mr. Rehnquist testified before the Phoenix City Council against a proposed local ordinance forbidding local merchants from refusing to serve black patrons because of race. In opposition to the proposal, Mr. Rehnquist stated that he valued a business proprietor's interest in choosing his customers above a black person's interest in non-discriminatory access to the business. Consistent with the views expressed in both his Brown and Terry memoranda, Mr. Rehnquist stated:

> Here you are talking about a man's private property and you are saying, in effect, that people shall have access to that man's property whether he wants it or not... I think it's a case where thousands of small business proprietors have a right to have their own rights preserved since after all, it is their business.

A week after the ordinance was passed unanimously by the Phoenix City Council, Mr. Rehnquist wrote a letter to the editor of the Arizona Republic in which he not only repeated these views but also expressed the opinion that the measure was socially undesirable. In a comment remarkably similar to views which I heard repeatedly from whites in my home town of Charlotte, North Carolina in those days, he complained that the only result of such an ordinance would be that

> the unwanted customer and the disliked proprietor are left glowering at one another across the lunch counter.

In Charlotte we may have glowered at each other for a little while, just as in countless communities across America, but not for long; and no one seriously doubts that we are a healthier society today because opinions like that of Mr. Rehnquist were rejected and black citizens were given full access to the conveniences of the community.

There is, regrettably, no reason to believe that Mr. Rehnquist's views have shifted over the years away from sympathy for Jim Crow, in the direction of greater sensitivity to the rights of racial minorities. His opinions and voting record since becoming an Associate Justice surely provide no basis for believing that he has developed any such sensitivity. To the contrary, he has voted on the Court against the claims of racial minorities with remarkable consistency.

Consistent with Mr. Rehnquist's views on Brown v. Board of Education, Justice Rehnquist has repeatedly voted against minorities in school desegregation cases. For example, in Columbus Board of Education v. Penick, 443 U.S. 449 (1979) and Keyes v. School District No. 1, 413 U.S. 189 (1973), he wrote frightening dissents in which he suggested (443 U.S. at 495-96, 413 U.S. at 257-58) that one of the most important school desegregation precedents, Green v. County School Board, 391 U. S. 430 (1968), should be limited so severely that the integration of our public schools would become practically impossible.

Anyone familiar with the history of school desegregation after Brown v. Board of Education knows that in the 14 years until the Green decision very little progress was made. It was the Green holding that started this nation on the road to genuine desegregation, by recognizing that mere "open door" or "freedom of choice" plans could not eradicate a system of segregation which had been in force in many communities for nearly a century.

Yet Justice Rehnquist, far from being respectful of this historic precedent, has sought to undermine it and return us to an era in which little, if any, desegregation would be possible. He may no longer have any quarrel with Brown itself, but he clearly has considerable disdain for the subsequent decisions of the Court that made Brown work.

His insensitivity to the civil rights of black citizens is not limited to the public school integration context. In Bob Jones University v. United States, 461 U.S. 574 (1983), the Court upheld the determination of the Internal Revenue Service to deny tax-exempt status to private schools practicing racial discrimination. Justice Rehnquist was the sole dissenter. The majority opinion, authored by Chief Justice Burger, found the Mr. Rehnquist's reading of the Internal Revenue Code so bizarre as to allow tax exemptions for "Fagin's school for educating English boys in the art of picking pockets" or "a school for intensive training of subversives for guerilla warfare and terrorism in other countries..." 461 U.S. at 591 n.18.

As recently as the end of this Term, in Firefighters v. Cleveland, _______ U.S. ________, No. 84-1999 (July 2, 1986), Justice Rehnquist dissented from a decision upholding a consent decree under which the City of Cleveland agreed to promotion goals for black firefighters as a means of remedying past racial discrimination. Mr. Rehnquist was of the view that remedying past racial discrimination against black firefighters violated the right of white firefighters, and that no municipality can strike a bargain with its own constituents to undertake broader relief than a court would have been entitled to grant after a trial. Firefighters v. Cleveland and its companion case, Sheet Metal Workers v. E.E.O.C., ____ U.S. ____, No. 84-1656, in which Justice Rehnquist also dissented, are only the latest in a long series of cases in which he has opposed nearly every affirmative effort designed to remedy employment discrimination against blacks. There is reason to question whether his objections are principled, for in his dissent in Steelworkers v. Weber, 443 U.S. 193 (1979), siding with white steelworkers who claimed that they were discriminated against by a voluntary, private corporate affirmative action plan, he stated that

> [N]o discrimination based on race is benign... [N]o action disadvantaging a person because of his color is affirmative.

443 U.S. at 254. In other words, though Mr. Rehnquist maintained that Phoenix merchants, in the exercise of dominion over their businesses, could exclude black patrons, Justice Rehnquist took issue with the private, voluntary exercise of business judgment when those complaining were white.

Consistent with Mr. Rehnquist's harassment of black Phoenix voters, Justice Rehnquist has repeatedly voted against racial minorities in cases concerning the right to vote. In Uvalde Consolidated Independent School District v. United States, 451 U.S. 1002 (1981), he wrote a sole dissent from the denial of certiorari in a case where the Fifth Circuit had merely concluded that a complaint which alleged both dilution of voting rights by an at-large electoral system and a discriminatory purpose on the part of the school district's board was good enough to state a claim under the Voting Rights Act. The very next term, the Court held that an at-large voting system coupled with proof of discriminatory intent could indeed result in a violation of Section Two of the Voting Rights Act. Rogers v. Lodge, 458 U.S. 613 (1982). Justice Rehnquist voted against that holding as well. As the Committee is well aware, Congress put an end to the debate the following year by amending Section Two to eliminate the use of an "intent" test in voting rights cases.

Although I expect that others may speak more comprehensively on the subject of Justice Rehnquist's extreme deference to the intrusion of criminal justice authorities on personal freedom, Batson v. Kentucky, ____ U. S. ______, No. 84-6263 (April 30, 1986), deserves particular note. In Batson, Justice Rehnquist dissented from a decision prohibiting prosecutors from the practice of peremptorily excluding black prospective jurors from jury service in criminal cases involving black defendants. He expressed the view that there was nothing wrong with this practice, so long as the prosecution was also allowed to use peremptory challenges to remove white jurors in cases involving white defendants. Apart from its doctrinal shortcomings, the opinion reflects the cynical view that citizens are only able to be rational and respectful of their oaths when a member of another racial group is on trial.

These examples illustrate several flaws in Justice Rehnquist's approach to constitutional adjudication, and in his judicial temperament:

1) He is not respectful of precedent. Like an advocate, rather than a judge, Justice Rehnquist attacks precedents that stand between him and the success of his regressive agenda. His attempt to undermine the long-standing Green decision in school desegregation cases is an excellent example. Only where a precedent that serves his purpose is being challenged does he cry out for faithful adherence to precedent.

2) Far from being respectful of the rights of state and local governments against federal intrusion, he is only too willing to oppose policies of state and local governments if he

disagrees with those policies. In the Cleveland case he was prepared to use a federal statute (as he interpreted it) to strike down an agreement voluntarily entered into by duly elected local officials and their own constituents, seeking to promote racial harmony in their own community.

3) Far from being a non-interventionist, he is an activist who constantly seeks to push the Court in a particular (backward) direction. Accordingly, he gives painstaking and sympathetic analysis to those considerations which he believes require the subordination of civil rights, while the competing civil liberties values receive no such analysis. Confronted with a civil rights claim, he does not pause to consider it dispassionately, but rather bends his critical faculties toward the fashioning of reasons to reject it. Whatever differences fair-minded persons may have about the results of constitutional questions, fair-minded process requires that competing views are evenly considered. Justice Rehnquist has not shown himself to be up to that task in civil rights cases. Confirming him as Chief

Justice would add your imprimatur to that shortcoming.

Conclusion

We may all be justly proud of the enormous strides forward the concepts of fairness and racial justice have taken in American life and thought. And while the people of this country may not be entitled to a zealous advocate of civil rights as their Chief Justice, they are at least entitled to one respectful of the precedents established by the Court and one who views new cases dispassionately. Because we are unable to conclude that Justice Rehnquist will bring to the chief stewardship of the Court those qualities of fairness, openmindedness and level judgment in civil rights cases, we must urge the Senate to reject the nomination.

Senator HATCH. Mr. Hooks, we will turn to you at this point.

STATEMENT OF BENJAMIN L. HOOKS

Mr. HOOKS. Mr. Chairman, my name is Ben Hooks, and I am the chairman of the Leadership Conference on Civil Rights, a coalition of more than 185 groups.

I would like to just reserve a minute for my good friend and general counsel for the Leadership Council, Mr. Joe Rauh.

I am a lawyer, a former judge, and it is not easy to oppose here, to oppose a confirmation for a Chief Justice. I have looked at Mr. Rehnquist's record.

In the 1950's, he wrote a memo to Justice Jackson advocating, I believe, the continuation of *Plessy* v. *Ferguson,* stating in another memo that the Court could not deal with all of these questions where white people in the South hated black people. He did argue as a law clerk for those positions. In the sixties, we find him in Phoenix. In 1964, he testified against public accommodations in Phoenix. The next day when it passed, he wrote a letter to the local newspaper in which he said you will be sorry.

In 1965, he appeared before the State legislature arguing against the public accommodations law. In 1967, in Phoenix, he appeared against school integration. In the 1970's, we do not know exactly what he did, because the papers have not been forthcoming.

In 15 years on the Supreme Court, he has not achieved a better record.

I come from the South. I am 61 years old. I have spent two-thirds of my life in a segregated society and scarcely more than 20 years in a supposedly integrated society. Most of the people I know in the South, white politicians, Congress persons, mayors, Senators, have said the same thing that Justice Rehnquist said. I do not hold against him those things simply because he said them. But what bothers me is that he apparently has not changed.

If eternal vigilance is the price of liberty, then duty dictates, common sense demands, and prudence mandates that we testify against his nomination.

[Statement follows:]

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Testimony of the Leadership Conference on Civil Rights Opposing the Confirmation of William H. Rehnquist to be Chief Justice of the United States

Benjamin L. Hooks, Chairperson

July 1986

Mr. Chairman and members of the Committee, my name is Benjamin L. Hooks. I am the Chairperson of the Leadership Conference on Civil Rights, a coalition of 185 national organizations representing minorities, women, the disabled, senior citizens, labor, religious groups, and minority businesses and professions. On behalf of the Conference, I want to thank the Committee for allowing us the opportunity to testify today.

The Leadership Conference on Civil Rights strongly opposes the confirmation of William H. Rehnquist to be Chief Justice of the United States. For thirty-five years, William H. Rehnquist has consistently demonstrated a marked hostility to the victims of discrimination. He is an extremist, a man dramatically out of step with the bipartisan consensus on civil rights in this country. The United States Senate must reject his nomination.

In the course of its thirty-six years, only rarely has the Conference taken a position on a judicial nomination. Indeed, over the past five and one half years, the Conference has opposed only four of President Reagan's judicial nominees.

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Each time the nominee has had a history of extremism or incompetence or both. We did oppose Mr. Rehnquist's nomination to be an associate justice 15 years ago. The Rehnquist record then and since demands that we record our opposition to his elevation to the position of Chief Justice.

We believe that Mr. Rehnquist's extremism on civil rights is incompatible with that high and special office. Whatever the arguments over the scope of the 14th Amendment to the Constitution, we believe that it is unarguable that the three Civil War Amendments wrote into our basic charter a special national concern for the status and rights of those Americans whose ancestors came here as slaves. That group of Americans today, as when the Amendments were adopted, suffers the consequences of that terrible institution and the practices and attitudes it reflected and begat. One who is out of sympathy with those purposes cannot fulfill the responsibilities of the Chief Justice not only of the Supreme Court but of the Nation.

Before going into this record, I must note that our focus today does not in the least indicate a lack of concern for other defining and disabling characteristics of the Rehnquist record -- his inveterate preference for the State over the individual (an odd characteristic for a purported conservative) and -- perhaps another way of saying the same thing -- his disvaluing of the civil liberties whose protection motivated the Founders of the country to enact the Bill of Rights. Others will develop these aspects of the Rehnquist record, and we concur in their conclusions. It is our role here, however, commensurate with our own history, to protest the proposed elevation of an enemy of civil rights.

Our indictment rests not on a single act, but on an accumulation of evidence. There is, of course, the record that received insufficient attention when Mr. Rehnquist was named to the bench 15 years ago: his opposition to public accommodations and voting activities by and on behalf of blacks in Arizona in his years there as a lawyer and, most telling and never adequately explained, his now famous memorandum to Justice Robert Jackson on the proper disposition of the then-pending Brown cases -- the landmark school desegregation cases that were before the Court during Rehnquist's clerkship there.[1] The memorandum to Justice Jackson did not receive the inspection and questioning it deserved in 1971, having come to light too late for that. It may now be too late to find the truth as to the origins and explanation of that memorandum. But we do have current evidence of the fact that at the time the memorandum was written, Mr. Rehnquist was wont to argue the merits of its position -- that is, the rightness of the separate-but-equal doctrine (see Washington Post, July 22, 1986, A8 col. 1-2).

Just as William Rehnquist disagreed with the reading of the Constitution unanimously announced by the Court in the Brown cases, he has continued to dissent from the Court's decision in cases involving segregated schools during his tenure on the bench. In the first northern school desegregation case to be decided there, the Keyes case from Colorado, Justice Rehnquist dissented alone.[2] His dissenting opinion not only displayed a rigid and insensitive approach to the inquiry involved when segregation is found in a jurisdiction that (unlike the South) has no history (or no recent history) of a legal requirement of segregated schools, but attacked a landmark in the Court's modern civil rights jurisprudence -- the Green case of 1968[3] in which the Court -- again unanimously -- disposed of the notion that the Constitution does not establish an affirmative duty to integrate but only forbids discrimination.

The next event in this distressing history came five years later in another northern school desegregation case, concerning the Columbus, Ohio school system. The District Court and the Court of Appeals for the 6th Circuit found that the Columbus school district had engaged in intentional acts of school segregation, that these acts violated the 14th Amendment under applicable Supreme Court decisions, and that a systemwide desegregation remedy was needed.

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[1] Brown v. Board of Educ., 347 U.S. 483 (1954).

[2] Keyes v. School Dist. No. 1, 413 U.S. 189, 254 (1973).

[3] Green v. County Sch. Bd., 391 U.S. 430 (1968.

The remedial plan was scheduled for implementation when school opened in 1978. The school district sought review in the Supreme Court, and it also applied to Justice Stewart (the Justice for that judicial circuit and therefore the person to whom normally such an application would be made) for a stay delaying implementation of the plan until the Supreme Court made a decision on the petition for certiorari. Justice Stewart denied that application on August 3. The Board of Education then went to Justice Rehnquist. He granted the stay, on August 11, 1978.[4]

Justice Rehnquist thus stopped desegregation in its tracks despite the lower courts' finding of intentional, systemwide segregation, despite Justice Stewart's denial of a stay, and most startling of all, despite the Court's established practice of denying delays or stays in implementing desegregation decrees pending appeal (even where review has subsequently been granted), absent some extraordinary circumstances not present here.

When the plaintiffs in the suit asked the Court to set aside the stay, the Solicitor General filed a brief for the United States, which had not previously appeared in the case, stating, "To our knowledge, this Court has never before granted a stay of the implementation of a school desegregation plan found by both a district court and a court of appeals to be appropriate to undo far-reaching constitutional violations in the operation of a school system." (Memorandum for the U.S. as amicus curiae, On Motion to Vacate Stay, Columbus Bd of Educ v Penick, Oct. Term, 1978, No. A-134, p. 11) The Solicitor General concluded that issuance of the stay by Justice Rehnquist was improper (Id., p. 12).

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[4] Columbus Bd. of Educ. v. Penick, 439 U.S. 1348 (1978).

The Rehnquist stay required undoing in haste elaborate plans for desegregation, thus depriving the black school children of Columbus of their constitutional rights for yet another year.

It is interesting to note that, while the subsequent disposition of the case on the merits is not a measure of the propriety of a stay, when the Court did reach the merits of the Columbus school case it affirmed 7 to 2 the order that Justice Rehnquist so seriously questioned in issuing the stay.[5] The Justice was, of course, one of the two dissenters.

The final, and perhaps the most glaring, manifestation of Rehnquist's hostility to minority rights and opposition to the courts' role in protecting them, is Justice Rehnquist's dissent from the Court's ruling in the Bob Jones case.[6] That was the case, we all recall, where the Court rejected the Reagan Administration's shameful decision to abandon the position that segregated private schools do not qualify for tax exemption under federal law -- the case in which the Justice Department shifted the Government to the side of the segregated schools. Again, Justice Rehnquist stood alone, espousing the view that the IRS regulation denying tax exempt status was invalid. Indeed, Justice Rehnquist was so eager to rule against civil rights that he would have reached out to decide that if Congress were to grant tax-exempt status to organizations that practice racial discrimination, that action would not constitute a violation of the Equal Protection Clause. (461 U.S. at 574, n. 4)

For thirty years, the Supreme Court, the Congress, and the Nation have repeatedly and emphatically repudiated the extremist views of William Rehnquist on civil rights issues. The Senate must not allow such a right-wing ideologue to become Chief Justice.

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[5] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

[6] Bob Jones Univ. v. United States, 461 U.S. 574.

The Senate must not confirm an individual who is dedicated to rendering asunder, as soon as possible, what it took the Supreme Court, the Congress, and the Nation three decades to put together.

A number of organizations in the Leadership Conference do not take positions supporting or opposing confirmations of federal officials, and for that reason, do not join us in this testimony. The Anti-Defamation League, the U.S. Catholic Conference, the American Jewish Congress, and the American Jewish Committee have specifically requested that they not be listed as concurring in this testimony.

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Senator HATCH. Thank you.

Ms. Rogers, we will turn to you and then to Mr. Rauh.

STATEMENT OF ESTELLE ROGERS

Ms. ROGERS. Thank you, Mr. Chairman.

Members of the Judiciary Committee, my name is Estelle Rogers, and I appreciate the opportunity to testify today on behalf of the Federation of Women Lawyers of which I am national director.

I am also testifying on behalf of the Women's Legal Defense Fund and the NOW Legal Defense and Education Fund.

Our opposition to the nomination of William H. Rehnquist as Chief Justice of the United States stems from our concern that Mr. Justice Rehnquist has not demonstrated a commitment to equal justice under law. In fact, the evidence is to the contrary.

Since he has been on the bench, and in his earlier career, he has made a remarkably consistent and concerted effort to restrict and withhold the protections of constitutional rights and liberties from minorities, from the poor, from political dissidents, and from women.

The committee should be aware that in approximately 58 cases in which Mr. Justice Rehnquist has adjudicated a claim involving discrimination on the basis of sex, he has voted against the party asserting the bias 47 times, or nearly 81 percent of the time, while, in the same cases, the decision of the Supreme Court has been adverse to that party only 25 times, less than 43 percent. This is no coincidence.

A reading of the cases leads to the inescapable conclusion that Justice Rehnquist views the scope of constitutional protection for women extremely narrowly. The guarantees of the equal protection clause, for example, can, according to him, be vitiated by almost any governmental explanation for State-sponsored discrimination on the basis of sex. In fact, in the 11 times out of 58 that Justice Rehnquist did vote with the Supreme Court in sex discrimination cases, in only two cases did the claim rest on the basis of the equal protection clause.

It has been said many times during this confirmation process that, in his 15 years as an Associate Justice, Mr. Rehnquist has dissented alone in 54 cases. Although any civil libertarian is tempted to admire his independence of spirit, our concerns run much deeper.

The Constitution according to Rehnquist leads ultimately to the triumph of the State over the individual, in sharp contrast to the finest tradition of the Supreme Court, and in direct opposition to the founding principles of the American Nation. Nowhere is this clearer than in his lone dissent in equal protection cases, which number 12 of the 54 lone dissents.

He has indeed carved out a solitary place for himself on the far frontier of constitutional thought. His steadfast unwillingness to afford the equal protection of the laws to all of the people renders him unqualified for the position of Chief Justice.

Nor is Mr. Justice Rehnquist much more generous with the rights established by Congress in its 20 years of civil rights legislation. Although the Supreme Court majority has consistently held that title VII of the Civil Rights Act of 1964 prohibits a wide variety of discriminatory practices in hiring, promotion, and compensation, Justice Rehnquist's reading of the statute's coverage is far more restrictive.

The overarching tenets of Justice Rehnquist's judicial philosophy are his deference to State and institutional interests, and his disregard for individual and civil rights.

In his 15 years on the Supreme Court, he has exhibited almost consistent hostility to the rights of women, choosing in case after case to deny or circumscribe venerable constitutional rights.

It truly——

Senator HATCH. Ms. Rogers, your time has expired.

Ms. ROGERS. Thank you, sir.

Senator HATCH. We appreciate it. We will now turn to Mr. Rauh.

STATEMENT OF JOSEPH L. RAUH, JR.

Mr. RAUH. My name is Joseph L. Rauh, Jr. I am general counsel of the Leadership Conference on Civil Rights.

You will forgive me, Mr. Chairman, if I speak from the heart. I was the law clerk to two great Justices 50 years ago, Justices Frankfurter and Cardozo. And I say to you very seriously, Mr. Chairman, this nomination is a desecration of the Supreme Court of the United States.

What we are doing is rewarding a lifetime of opposition to individual rights—a lifetime of that opposition—with the highest judicial and legal post in the country. The Senate cannot let that happen. I do not care whether you look at him as a law clerk—and do not fool yourself that memorandum was his views—or as a lawyer or justice. I challenge any Senator to read the Kugler book on simple Justice and then say the memorandum was not his own views. Then you have all the way through Phoenix when he opposed voting, when he opposed the slightest civil rights law, all the way up through the Court where he opposed everything, dissenting alone in *Bob Jones* and *Keyes,* even dissenting in the *Columbus* case.

No, he cannot change. All stages of his life are so consistent that he is not going to change. Do not try to think you can be hopeful in this situation. No, he will not change.

As a good lawyer, Chairman Hatch, you tried to get him out of his statement that this country is no more committed to an integrated society—you were very good at it—than a segregated society. [Laughter].

But, sir, no matter how good you were in trying to get him out of that, the remainder of the sentence which you said changed it only reinforced it. Because what it says is that we are dedicated to a free society. We were always dedicated to a free society, but we had a segregationist society.

I do not know whether this man is a bigot or not. It is very hard to say. But I do know that the things he has done in his lifetime are the same as they would have been if he were a bigot.

I think it is better to describe him as a statist. He thinks the State is always right. Whether it is women, blacks, Hispanics, homosexuals, aliens, people on welfare, the State always is right when it denies them their rights. That is no position for a Chief Justice. That is no view for him to hold.

The time has come for the Senate to stand up for its rights. The Senate almost had this job of appointment alone from the framers, and what they did was to turn around and say no, we will split the job between President and Senate. Well, the Senate has got to do the job that the President has failed to do. The Nation has to have a symbol there as the Chief Justice of someone who believes in individual rights, not someone who has devoted his life to the contrary.

Thank you, sir.

Senator HATCH. Thank you, Mr. Rauh.

We will turn to Senator Biden.

Senator BIDEN. Mr. Rauh, is there a distinction between the Justice's records on issues relating to minorities when he is interpreting the Constitution and when he is interpreting the statute? Do you see any distinction?

He offers instances where he has voted with the majority to either expand or confirm the rights of minorities. It seems to me that usually occurs in statutory cases. But I wonder if you would comment?

Mr. RAUH. I see no distinction, sir, but I cannot claim to have read every statutory decision. I think I have read the constitutional ones. I think he follows the same view of limiting individual rights and increasing the powers of the State in both.

Senator BIDEN. Mr. Hooks, is there a distinction between—the Court is characterized as being made up of several conservatives, several liberals, and some centrists.

If one or the other conservatives were to be nominated to the position of Chief, would you be here?

Mr. HOOKS. I have looked at the present Supreme Court, and I am almost of the opinion, speaking off the top of my head, that I do not think that I would be in opposition to any of the sitting Justices. That is my thought.

But now let me qualify that by saying, of course, I have not read their record as close as I have Mr. Rehnquist's record. But as a practicing lawyer, and NAACP is before the Court all of the time, I do not think there is a Justice that—I may not be pleased with all of them, but I do not think I would be in opposition. That is my best.

Senator BIDEN. Ms. Jones, if it could be proven that there has been a progression in Justice Rehnquist's voting record that the cases that were the most objectionable where he has, in fact, imposed the most limited interpretation of the due process and equal protection clauses, if it could be shown that there were progress or growth—growth connotes a value judgment—but change, broadening of the application, would you be in here in opposition still, do you know, or would you give the benefit of the doubt?

Ms. JONES. Senator, I would never say I would not consider new evidence because that is what that would be.

Senator BIDEN. Touché.

Ms. JONES. But on the point that you raised earlier about statutory cases versus constitutional cases, you know, on statutory cases, things ought to be a little different with Mr. Rehnquist because the

Congress has spoken. I mean the Congress, Voting Rights Act, Housing Act, title VI, title VIII, title VII, Disability Act. Congress has declared as a matter of national policy what the law is.

So, in those cases, and especially if you look at the rules of statutory construction, first you go to the language of the statute, and then after that you interpret the statute most broadly as possible.

And it would be interesting to look at Mr. Rehnquist's votes and decisions in statutes that have been passed since 1960, since he has been on the Court, because I think that is the things we would see.

You know, for example, the counsel fee cases. The Congress passed the Counsel Fee Act in 1976 to facilitate bringing civil rights suits into Federal court so that lawyers could act as private attorneys general and get these rights vindicated. There has been 23 cases in the Supreme Court since that statute was passed that Mr. Rehnquist has sat on since he has been here, 23 cases; 8 of those cases were unanimous, so that was Mr. Rehnquist there. And, you know, when you order unanimous cases, having eight other Justices with you, then you get a chance maybe to write the opinion.

Senator BIDEN. My time is moving.

Ms. JONES. OK. I just want to say 14 of those cases, in 14 of those cases, Mr. Rehnquist gave the most narrow interpretation possible. He voted against the interests of the claimant, in 14 of those cases.

Senator BIDEN. Let me put it another way.

One of the reasons why I have to go back and reread the statutory cases, if in fact a case could be made that although this man is a statist, that he always go in the direction of whatever the elected body suggests the law should be, if, in those cases, there is a broad interpretation of the law as it relates to the statutes, as it relates to all others but minorities, but a narrow interpretation as to minorities, it would seem to me that would be a fairly revealing insight into the justice. If, in fact, there is a consistency that he always broadly interprets the State law or the Federal law as statutorily passed, then in fact there is power to be argued.

That is why I asked the question. But I will have to do more of my own research on that. You have been helpful.

I have some questions for Mr. Mitchell maybe on the next round.

I thank you all. My time is up.

Senator HATCH. Thank you.

Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I have no questions.

Senator HATCH. Why do we not move to Senator Specter, and then I will move back to Senator Kennedy.

Senator SPECTER. Thank you very much, Mr. Chairman.

Mr. Hooks, you only had a few moments to testify, and you did not refer to the incident involving the poll watching activities.

How heavily do you weigh that, if at all, in your evaluation of Justice Rehnquist?

Mr. HOOKS. I weigh it very heavily. Even though I am an independent now, in my young life in Shelby County in the late forties and fifties, I was a Republican.

And I remember when black voters could not belong to the Democratic Party in my county. And I remember when this nationwide movement started, of whites in the the periods of so-called black and tan Republicans. And I myself was involved in several of those pushing and shoving incidents. So I know they were happening all over the country.

I do not know anything about Mr Rehnquist being involved except for the fact that we had affidavits from the Phoenix branch of NAACP, six of them, stating it did happen. We have people here to testify today that it did happen, and I saw similar things happen in my county. And I know from meetings that it was happening all over the country at that time as there was an attempt being made to change the composition of the party. And I was very well affected by that.

But the major thing that I wanted to say—may I just take a moment to say this. What someone did, some of those very people that I was in a shoving contest with, you know, 20, 25 years ago, we have since become great friends. But there has been a change of attitude.

I am looking at the New York Times Magazine of March 3, 1985, and I would like to submit it for the record if it has not been, and this is what the magazine article said.

Senator HATCH. Without objection, we will place it in the record.

[Not available at press time.]

Mr. HOOKS. It says "But I can remember arguments we would get in as law clerks in the early fifties"—this is Justice Rehnquist speaking—"and I don't know that my views have changed very much from that time." This is March 3, 1985.

And the next statement he makes is "There is still an acceptable perfectly reasonable argument the other way on *Brown* v. *Board of Education,* and I don't know how much I'll"—I want to read it correctly now; he refuses to say whether he agrees or "whether he wrote them—Whatever I wrote for Jackson was a long time ago and it kind of integrated to something I'm telling you now I find rather difficult."

The thing that puzzles me is in 1985, in this very wide ranging interview, he never one time, as far as I can see, categorically states, without any reservation, that "I don't believe now what I believed then." And this troubles me.

Most of the white politicians with whom I have had to vote in the South have made these kinds of statements. I will sit here and watch Senators and Congress people, and mayors, with tears in their eyes, admit they made them and that we were right, that they were wrong.

But what I fail to see in any of Mr. Rehnquist's decisions is any acknowledgment that he was wrong then which certainly would change my viewpoint now.

So that incident, getting right back to your question, does disturb me somewhat.

Senator SPECTER. Well, Mr. Hooks, Justice Rehnquist has denied that he was involved in any harassing tactics. That whole issue has been a very significant one in these proceedings and we have yet to hear the witnesses so that we can make our own evaluation as factfinders, which I think we have to do.

And my question to you would be that if those allegations are disproven, or the committee feels that they are, would that affect your viewpoint?

Mr. Hooks. It is very minor as far as I am concerned, really, because what is really important is how he felt in 1964. Look at his pattern. He loses the argument before the Phoenix City Council in 1964. The next day he writes a letter to the paper saying, you will be sorry you did this.

In 1965, 1 year later, he goes to the State legislature to argue against a civil rights law. In 1967, 2 years later, he argues against school desegregation in Phoenix. In the 1970's, I am sure, if you would get the Office of Legal Counsel, you would find that same thing.

That pattern continues from the 1950's through the 1970's and through now. And that is what disturbs me more than anything.

Because, you know, I could be up for confirmation for Chief Justice. And a witness could say I had pushed somebody. And I would have to say I did; and that I am sorry for it, if I am. And I suspect I would be, if I were called on.

So that is important only as it relates to his memory; not to the incident. Let me make very clear: Not to the incident, but as to his recollection of the incident.

Senator Specter. I am interested in what all of you think is the appropriate range of discretion. Let me start with you, Ms. Jones, if I may.

Senator Hatch. Senator, your time has expired. Maybe I better interrupt at this point, and turn to somebody else.

Senator Specter. I will take it up at the next round.

Senator Kennedy. I would like to thank our panel very much for, I think; enormously helpful and moving testimony.

Welcome back, good friends who have been at the Judiciary Committee a number of years ago when we were trying to deal with some of the problems which Ben Hooks has spoken so eloquently about, and the others in the panel.

I think in our society today, we have to really ask ourselves why the issue of civil rights is so important. An issue that our Founding Fathers failed, the Supreme Court failed in the *Dred Scott* decision; we fought a civil war on this question. People are wondering why we are looking back at *Brown* v. *Board of Education*. The fact of the unanimous Court, and the lesson and the statement that was made, I think, opened the path for a peaceful revolution in our society. We missed it in the time of the Civil War, but that was an extremely important message.

And that message really resulted, as a result of the Chief Justice of the United States.

And I think that all Americans have to understand that the question of discrimination, in its various forms, is not freedom from the landscape of our society. We can legislate, but we cannot in many instances touch the hearts and souls of our fellow citizens.

Now the real question, I think, on this issue of civil rights and equality is whether we are going to really continue the very significant and important progress, which I think this country can take a great deal of satisfaction from. It has been painful in many parts of the country, including in my own part of the country.

But I suppose I am asking you to speak again about this basic and fundamental question, because I think it is so fundamental.

And that is, whether you have, in your own lifetime, ever been so troubled by any either appointment for any position——

Mr. HOOKS. I think we must——

Senator KENNEDY [continuing]. As you are today about this nominee for this position?

Mr. HOOKS. [continuing]. Recognize that the Chief Justice is important. It is the third branch of government. It is more than first among equals. He does assign the majority opinions where he is on the majority side. He does have the opportunity to preside at the meetings.

I think it is a very important position. But more than that, it speaks to the Nation and to the world, and particularly at this time of apartheid in South Africa and the whole question of where America, stands to elevate to the Chief Justiceship one who has been antiminority, antiwomen and antirights of individuals.

And I thought, Mr. Senator, that your opening statement, if Mr. Chief Justice Rehnquist of the 1950's and '60's had been on that Court, thinking like he thought, we would still be in separated schools; I still would not be able to get a cup of coffee in the restaurant of my choice; I still would not be able to use hotel accommodations.

And I do not think there is anything in this record that changes that. And therefore, I do think it is one of the most important things I have ever testified to.

Senator KENNEDY. Mr. Rauh, would you speak to that?

Do you tremble, as one who, again, as I say, who has been here before the committee, as we in the Senate, as an institution, have been trying to grapple with complex and difficult questions on accommodations, transportation, voting, housing, a whole variety of different aspects of the cancer of, discrimination in our society, which our Founding Fathers felt but were unable to deal with; and whether you really fear that if this nominee is approved for that position, that we are really endangering the continued hope for meaningful progress in this area of such great importance for the United States, and for the United States really as a leader of the world?

Mr. RAUH. I do, sir.

I believe the peaceful civil rights revolution to which you have referred is the happiest event of my life, that we have turned the law upside down, from segregation and discrimination to integration and antidiscrimination.

That will not continue if this man is confirmed as Chief Justice of the United States.

Not only will we stop the further progress that we need, but there will be a throwback.

This is a very, very dangerous situation. I have been here many times, as you say. I have never had one I felt more from the heart.

Senator KENNEDY. The time is up, which I regret.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTER. Mr. Chairman, I have already had my first round. I think that it might be appropriate to defer to Senator Metzenbaum.

The CHAIRMAN. The distinguished Senator.

Senator METZENBAUM. Mr. Chairman, for one question—I understand my colleague from Illinois has to leave for another meeting at 10:30. I understand he wants to ask a question, and I will yield to him for that purpose.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Yes; I thank my colleague, Mr. Chairman.

Dr. Hooks mentioned change that he has seen in people. I would particularly like a response from Joe Rauh, you will forgive me if I say you have seen a little more of all of this than the rest of the witnesses.

One of my questions is, not only in the area of civil rights, but also more generally: Is Justice Rehnquist open-minded?

Mr. RAUH. I have seen no evidence of any open-mindedness whatever. I think anyone reading the constitutional opinions would find that he has followed what he felt was OK in 1952, segregation; that he has followed what he thought was wrong in later periods when he opposed all civil rights legislation.

He is so consistent on his anti-civil-rights position, on what I call his statist position, on his belief that the State is always right and the individual is always wrong, he is so consistent on that that I do not see how anyone could call him open-minded

Senator SIMON. Any comments or reflections from the other witnesses on that.

Mr. MITCHELL. I, Senator, certainly as—in the last 4 years I have chaired, in the State of Maryland, the Senate Executive Nominations Committee, which would be the comparable committee to this committee in my own home State of Maryland.

And as chair of that committee we have had appear before judicial appointees of the Governor. One of the things that we have been able to see from that position is whether or not judicial appointees are open-minded, and whether or not they are fair and impartial.

And when they fail that test, certainly that is a reason for rejection. Not so much philosophy, but whether they are fair and impartial and willing to put aside their own personal views.

And I do not see that in Justice Rehnquist; even if there was a modicum of it I do not think many of us would be here.

Mr. HOOKS. If I may just say, very briefly, that the reason the record convinces me, that when we talk about the cases where—and I just want to repeat this one thing—that I have seen southern politicians change, and that is important. I am not holding against this man all that he said 20 years ago; I am dealing with the fact that I have not seen the change. And I have seen it up and down the South in my travels, in Senators and all of these people. I have seen a genuine change. And if they have not changed, at least they give lip service to it.

Mr. Rehnquist, in my judgment, does not even give lip service to it. And I do not think that a reading of this record would show that he is open-minded. Because where he has agreed with the changes in the civil rights situation, it seems to me it has been grudgingly and of necessity. And wherever he has an opportunity to knock it down, the *Bob Jones* case on some specious reason about statutory authority versus authority given to IRS, and that is not a really good reason; but where he has found anything to hang his hat on that keep progress from happening, he has done it, in school cases, in employment cases, in that case involving the Moose Lodge, the private property.

I see a consistent strain of what he said in 1964 that the right of the restaurant owner is more important than the right of the individual to be a citizen. I see it in the *Moose* case. I see it in what Joe Rauh refers to as this statism above the individual.

Ms. ROGERS. Senator Simon, if I may speak as the one representative here right now from the women's rights community, I think that one can say on reading all of the women's rights decisions that they are extremely result-oriented. Almost without exception, that they are straining in many cases at the bit to reach the result that he wants to reach. And there does not seem to be very much evidence of openmindedness there.

Ms. JONES. Senator Simon, I would make two comments to that.

One, it would be extremely difficult to come up with an example of Mr. Rehnquist having voted with the majority in upholding the civil rights/civil liberties claim of a black person before the Court in a closely contested case.

That is going to be extremely difficult to find.

And in these cases that are close, four-four cases, if I had a client that was going before the Supreme Court, and it depended on the Chief Justice, I would have to tell that black civil rights plaintiff that more than likely that case would be lost.

The Legal Defense Fund litigates in the Supreme Court. We had 23 cases there this term in some form or another. And when you go there, and you argue, and Mr. Justice Rehnquist as an Associate Justice, sitting over to your right, the second Justice in, is one thing. And when he asks you a question, you know, you just know in a closely contested case, his mind is made up. And so you answer the question in such a way as to educate and hopefully illuminate the other Justices on the Court.

Now, to move Mr. Rehnquist from that position to the Chief Justice, so when you come there and there he is, it is going to affect practitioners, and the impact that it is going to have in terms of civil rights lawyers and civil rights clients across the country, and you are right on target.

That question of perception and symbolism is paramount. And it is critically important on this issue.

Senator SIMON. I thank you.

And I thank you, Mr. Chairman. I hope my time is not charged against Senator Metzenbaum.

Senator METZENBAUM. If it is, I would not have any luck. [Laughter.]

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Mr. Chairman.

Mr. Hooks, in the statement your organization issued this week; you said that the Senate must not allow such a rightwing ideologue from becoming Chief Justice.

What harm do you foresee occurring in this country and to the Constitution if Justice Rehnquist does become Chief Justice?

Mr. HOOKS. I think the first harm is the message itself, the symbolism of the message; that a man who openly espoused action against public accommodations; who was against integration in the school system in his home county; who was involved one way or the other against the right of blacks to vote; who went to the State legislature to lobby against integration. Every act of his life in the 1960's indicated he was not for integration. Who said to our branch president—and we have an affidavit I believe to that effect in one of these pieces of testimony—that he was against all civil rights laws.

In the 1970's there does not appear to be any change. We came to the 1980's to the 1950's, and he was asked the question: You made all these statements as a law clerk, what do you think about it now? I do not think I have changed.

The very symbol of that type of person, after all the years this country spent trying to straighten out the racial question, and then the question of the sexes, now to put that person into the Chief Justiceship—the symbol is bad.

Second, I think that there is authority, and some additional prestige attached to the Chief Justiceship in actually shaping the leadership of the Court. And it certainly would not be in the Earl Warren tradition nor in the Burger tradition.

I do not want to take any longer. Those two things: dangerous as a symbol, and dangerous also in reality.

Senator **Metzenbaum**. Mr. Rauh; there has been a lot of discussion about the *Arizona* case, the Jackson memo.

You were a clerk for two Supreme Court Judges. You also probably have appeared before committees of the U.S. Congress maybe more than any other individual I know.

As I see it—and I would like to get your view—is the issue with reference to the facts that developed in the voter intimidation cases, is the issue whether they did or did not occur? Or do you see the issue relating very directly to the credibility, to the integrity, to the full representation of Justice Rehnquist?

It seems to me that what somebody did 30 years ago is really not as important as to whether or not—as Mr. Hooks has pointed out, you can take a position, and then you can say, I was wrong, I should not have done it.

Justice Rehnquist has said: I did not do it. It just did not occur. The answer is no.

And I would like to get your perspective on the question.

Mr. **Rauh**. I agree completely that it is far more important whether he was telling the truth when he came up for Associate Justice than whether in fact he did those things.

If he had walked in in 1971 and said, why, hell, all us Republicans in Arizona were trying to keep the blacks from voting, because they always vote Democratic; and I think that was a terrible thing I did and it was wrong. I do not think anyone would pay any attention to it.

It is his trying to say that it did not happen when there are so many who said that something happened—the degree of what happened is still open—but that something bad happened, there is no argument and thus there is a real credibility issue.

There is a credibility issue on the whole problem of voting. There is a credibility issue on the memorandum. I would challenge anybody to read the Kugler book on this point and not come out with the answer that it was his views, not Jackson's.

There is a credibility problem on that deed up in Vermont. I did not think much of the deed in Maricopa County, AZ, where there was a broad one. But this was specifically typed in. Who in heavens name ever had a deed in which something special was typed in about the Hebrew race and they did not know it was in there?

Of course he knew it was in there. Of course he knew the memorandum was his views. Of course he should have come clean.

Had he come clean on all of these things, I think one might have some sympathy for him.

Senator **Metzenbaum**. Thank you.

Ms. Jones, how many cases have read—Supreme Court decisions of Justice Rehnquist—in the past several weeks?

Ms. **Jones**. Oh—the Legal Defense Fund, I would not say that I personally have. I have read quite a few. But my colleagues and I; oh, we read close to 150 cases or more.

Senator **Metzenbaum**. And in any of the cases, did you find any evidence at all, any indication, that would give you cause for comfort as a member of a minority or as a woman, in reading those decisions?

Ms. **Jones**. Senator Metzenbaum, the short answer to that is, no, there is no comfort.

But the—you know, Senator Hatch, and I am interested in looking at that list, I understand has introduced a list of some 27 cases in which he said Mr. Rehnquist has favored the civil rights/civil liberties claim. I am interested in looking at that.

Now he mentions *Hamm* v. *South Carolina*, and some of these other cases. You look at these cases of Mr. Rehnquist. He is there when there are seven or at least usually eight other Justices already there. And he will come on to the case, and he will sometimes get the right—the majority opinion.

You will find him usually in civil rights cases in unanimous decisions. That is where you will find him. There are a lot of nine to zero.

Now, when the case is closely contested, on these close votes, you know, these five-fours, you do not find Mr. Rehnquist there.

When you look at the—and what we have been trying to pay particular attention to, and we have not finished, is looking at these statutory cases. Because that gets us out of the whole question of, well, this philosophical approach toward equal protection and due process clause, or expansion of the establishment clause, Congress has already determined what the policy is when there is a Federal statute. And to see how Mr. Rehnquist decides on statutory cases.

And once again, I am sure it is going to show, and we will finish it in the middle of next week or so, those cases, other than the nine-zero cases, you will find him voting in almost every instance to limit the civil rights claim of the black petitioner.

Senator **Metzenbaum**. I see the image of the chairman as if he were there. The red light is on.

Senator **Mathias** [presiding]. The chairman is here.

Senator **Metzenbaum**. The chairman is here; excuse me.

I defer to the chairman.

Senator **Mathias**. Senator Heflin.

Senator HEFLIN. Well, Mr. Chairman, a great number of the questions that I had in mind have been asked. But I am a little bit confused.

Mr. Hooks, if you would, quote again that statement from the New York Times 1985 article relative to the Jackson memos. I am not sure that I followed that.

Mr. HOOKS. What I was saying, and I will have to explain it. He was saying as a law clerk he quite often argued for the correctness of the *Plessy* v. *Ferguson,* or the kinds of things stated on the Jackson memorandum, the quotation about "you have to understand that many white people in the South just do not like colored people" and the Court, you know, cannot be a social arbiter. And this is what I was referring to, and it says this: "How do you get your views? he muses." "I do not think anybody has any idea. Obviously there was a long part of my life when I was in high school and the Army, that I simply did not give any thought to these things."

"But I can remember arguments we would get into as law clerks in the early 1950's, and I do not know that my views have changed much from that time." I think that was the particular sentence I read, and I——

Senator HEFLIN. I was thinking more about Justice Jackson's memos.

Mr. HOOKS. All right. Then he says on that, "Asked if his views on *Brown* have changed since that time." Justice Rehnquist replies—and I think this is important—"I think they probably have." "I think."

Senator HEFLIN. You still did not point to whether you were quoting something there from the memoranda that he had written to Justice Jackson, and that is the point I was trying to get to.

Mr. HOOKS. Well, the only thing I said that I think they probably have, he says he now accepts Brown as the law of the land, yet he still maintained, "I think that was a perfectly reasonable argument the other way."

As to the memos discovered by Professor Hutchison, he demurred, refusing to say whether he agrees today with what he wrote then.

Whatever I wrote for Justice Jackson was a long time ago, and I have kind of integrated some—and I am telling you now I find rather difficult. I read these things because I think it shows an ambivalence that even in 1985 he was not willing to say squarely that what he said then was wrong.

And this article, it is a fairly long article, and I only picked out the two parts I think are the most relevant to what we were talking about today.

Senator HEFLIN. Ms. Jones, let me ask you this, somewhat colored by Senator Metzenbaum, but I would like to get your thoughts on it.

There are a number of issues outside of the ideology issue: the recusal issue, the *Laird* case, the voter challenge issue, the memoranda to Justice Jackson, the covenants in the deeds, and then there is, as Senator Metzenbaum has listed, the lessened candor or the credibility.

Now, which of those issues do you feel bothers you the most and why?

Ms. JONES. Senator Heflin, we are talking about the Chief Justice of the U.S. Supreme Court and we are talking about issues of integrity, his ability, sensitivity, credibility. I think all of those issues are critically important issues—ail of them. And I do not think that one is more important than the other. I think they all have to be weighed in this great committee. And I think we need to address each of them.

I am a civil rights practitioner, but I am as intent of practicing before a Justice of the U.S. Supreme Court. It is also important to me that I know what his role has been, if he has had any role, in the activities regarding the message there, whether or not his activities were proper with regard to not recusing himself from *Laird* v. *Tatum*. I think credibility issues are critically important. The whole voting poll-watching, I have no particular information on that, but that is an important issue for this committee to resolve as well as his sensitivity on questions of civil rights.

Senator MATHIAS. Senator Specter.

Senator SPECTER. Mr. Chairman, I have many more questions, but because of the long list of witnesses, I am going to defer any further questions at this time.

Senator MATHIAS. Senator Kennedy.

Senator KENNEDY. Mr. Chairman, I would like to ask Mr. Hooks and Mr. Rauh just a different type of question.

We heard as we went through the hearing last night that the administration has been willing to exercise the doctrine of executive privilege with regards to the information on certain memoranda that Mr. Rehnquist authored when he was in the Justice Department. And this is the same tired, shop-worn, discredited argument that we used to hide the Nixon tapes during Watergate. And I think many of us have to ask what they are attempting to hide now. I mean, what is the 18½ second pause at this time.

Do you find it distressing that the Justice Department in 1986 is still trying to respect the confidentiality of controversial documents of the Nixon administration?

Mr. HOOKS. I do. I will say two things very briefly. No. 1, it disturbs me that, according to the memorandum, and I heard you and Senator Heflin read it the other day, there was no way under that memorandum that President Reagan has written to keep those documents from coming to light. And then they invoked executive privilege, probably following Senator Biden's suggestion made in some kind of way.

But the thing that really bothered me was when the lawyers on the U.S. Government said that if you do not have confidentiality, a lawyer will not be forthcoming. I would hate to think that my profession is so shoddy that if we do not believe that our communications will never come to light that we will not write them. I would like to think that U.S. Government lawyers, whatever they write and to whomever they write it, unless it involves national security, they are willing to let the world see it. And that bothers me. That is a stain on every lawyer in this country to say that we cannot write a decent opinion unless we are sure it is never going to come to light. And that is what was said, as I recalled it, right from this table.

That bothers me, and I say there must be something to hide or else they would not be invoking that privilege at this time.

Senator KENNEDY. Mr. Rauh, you have been around at this time during certainly that period. Your comment.

Mr. RAUH. It is a rule not only derivative from this committee's action, but it is a rule of law that when you hold back documents that are in your possession, it is presumed that there is something that will hurt you in those documents. And I think there probably is something that will hurt confirmation in those documents.

I think executive privilege has been abused. I think we are seeing more of that here. I think we will get more and more of that. I thought your statement yesterday was exactly right, and it is a shame there is no way to test it. I sat up last night trying to think it through. I should have been asleep, but I was trying to think through how you or we could bring a lawsuit fast enough to help your position on this. I cannot think of anybody with the standing to do that.

But I must say I think it is a shocking thing to engage in cover up on anything as important as the Chief Justice of the United States.

Senator KENNEDY. Well, let me just finally ask: Given what I think is the testimony of Mr. Hooks in reference to this recent New York Times Magazine article that indicate by the words of Mr. Rehnquist himself that his views really had not changed very much, do you not believe that it would be valuable for this committee to gain that information dealing with issues involving civil rights, involving civil liberties, involving first amendment kinds of questions? Do you not think that that would be of value to the American people?

It is wonderful that they exercise executive privilege to the U.S. Judiciary Committee, they are exercising it to the American people, are they not? And the result of that position, in spite of President Reagan's mandates to the various agencies, they are effectively saying for national security reasons, we cannot get the memoranda on the questions of civil rights and civil liberties.

And I know you were here at the time when we considered Mr. Rehnquist last time. We got information after the hearings were over because it was not forthcoming. We got information when we were debating the question on the Senate floor and had no opportunity to inquire. And I would say that was a disservice to this committee and to the Senate because we failed.

I was wondering, given the fact that you followed the earlier hearings and have followed these hearings—Mr. Rauh certainly has, and I am sure the others did as well. But I am interested in your response.

Mr. HOOKS. Yes; I think it is very important that those documents should have been forthcoming. If they were documents that actually referred to the national security, they of course should have been cut out. But I remembered, in that period of time when Mr. Rehnquist also made the statement, that nonviolent civil disobedience should be punished as much as violent, as I got the quotation. I cannot remember. I think it is in this article. And as one of those who worked with Dr. King, as one of those who believed in the concept of nonviolent civil disobedience, as one of those who advocates in South Africa now, that we not have a bloody revolution but a nonviolent approach to this. It bothers me when the Chief Justice designee says that that is entitled to the same kind of punishment, as I read his statement, that violent disobedience would have, because it is a longstanding practice of this great country that if we are willing to pay the price, we can nonviolently prove our point.

The NAACP stoked its legal reputation—on nonviolent protest, putting people on streetcars to test Jim Crowe laws and then going through the court. And I so much respect, so passionately believe in the rule of law that it disturbs me that we are putting into office a person who apparently does not believe in that rule of law as I do.

Senator KENNEDY. Thank you. I will just ask Elaine Jones if she would provide for the committee information on the Justice Rehnquist decisions involving claims of race discrimination based on statutes rather than the Constitution, if she would provide that memoranda—because the time is moving along—for the record, I would appreciate it.

Ms. JONES. I would be happy to do that.

Senator KENNEDY. Thank you very much.

[Information follows:]

Legal Defense Fund

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August 8, 1986

The Honorable Strom Thurmond
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

I am writing to provide the additional information requested at the August 1, 1986 hearing regarding the nomination of Justice Rehnquist to serve as Chief Justice. We respectfully request that this letter be made a part of the record of the hearings on the nomination of Justice Rehnquist.

(1) We have identified 33 cases in which Justice Rehnquist voted in favor of a black complainant in a race discrimination case. Of these, 31 were unanimous opinions; in the two remaining cases only a single Justice voted against the black complainant. A list of these decisions is set out in Table A.

(2) We have identified 14 race discrimination cases brought by or on behalf of blacks in which Justice Rehnquist cast the deciding vote. These include nine cases in which the rest of the Court was evenly divided, and four cases in which, because only eight Justices participated, a vote by Justice Rehnquist in support of the complainant would have had the effect of upholding by an equally divided vote a favorable decision in the Court below. In the remaining case, Arlington Heights v. MCDH, Justice Rehnquist's vote determined whether the lower court would be permitted to consider on remand the plaintiffs' racial discrimination claim. In every one of these cases Justice Rehnquist cast the deciding vote against the civil rights claimant. None of these cases involved a dispute about quotas, and none of these cases concerned whether a particular statute or constitutional provision forbade practices with a discriminatory affect, or were limited to instances of intentional discrimination. A list of these decisions is set forth in Table B.

(3) At last week's hearing we urged the Committee to review with particular care Justice Rehnquist's record regarding the interpretation and application of twentieth century civil rights statutes. We believe that aspect of the nominee's record is important for several reasons. First, because such cases involve considerations of statutory construction, and are thus governed by well established rules of statutory construction, a nominee's

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The NAACP LEGAL DEFENSE & EDUCATIONAL FUND is not part of the National Association for the Advancement of Colored People although it was founded by it and shares its commitment to equal rights. LDF has had for over 25 years a separate Board, program, staff, office and budget

constitutional philosophy should have little impact. Second, Justice Rehnquist has explained that his decisions on constitutional cases derives in part from a reluctance to override the will of the majority as expressed in legislation; in statutory cases, however, it is the will of the majority as expressed by Congress which the Supreme Court is asked to enforce. Third, prior to becoming a member of the Court, Justice Rehnquist on several occasions voiced opposition to the adoption of certain civil rights measures. Justice Rehnquist's actual record with regard to statutory civil rights cases is the best evidence as to whether he has been influenced as a judge by his personal disagreement with this legislation.

We have identified a total of 83 cases since 1971 in which there has been some disagreement within the Court as to the interpretation or application of a twentieth century civil rights statute.[1] These cases involve more than a dozen different laws covering employment, housing, voting, and federal assistance programs, and prohibiting discrimination on a variety of grounds, including race, sex, national origin, age, and disability. Only four of these cases involved a dispute about quotas or affirmative action.[2] Only two of these cases concerned whether a particular statute forbade practices with a discriminatory effect, or was limited to instances of intentional discrimination.[3] Because these are cases in which the interpretation or application of a civil rights statute was sufficiently debatable that members of this Court reached different conclusions, it would not, of course, be reasonable to expect Justice Rhenquist to vote in every case for the result more favorable to the civil rights plaintiffs. The Court as a whole reached such a favorable result in slightly less than half of these cases.

Among the 83 cases in which members of the Court have disagreed about the interpretation or application of a twentieth century civil rights statute, Justice Rehnquist has joined on 80 occasions for the interpretation or application least favorable to minorities, women, the elderly, or the disabled. In two cases, Albemarle Paper Company v. Moody and Dothard v. Rawlinson, Justice Rhenquist's interpretation of Title VII was less favorable to minorities and women than the standard adopted by the majority in each of those cases, but more favorable than the standard and result urged by a sole dissenter in each case. In only one of the 83 disputed cases, Cannon v. University of Chicago, did Justice Rehnquist vote for the interpretation of the law that was advanced by the civil rights plaintiffs. A complete list of the 83 cases is set out in Table C.

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[1] This analysis does not include cases in which Justice Rehnquist joined unanimous opinions rejecting or sustaining a claim under one of these statutes.

[2] Firefighters v. Cleveland (July 2, 1986); Sheetmetal Workers v. EEOC (July 2, 1986); Firefighters v. Stotts, 81 L. Ed. 2d, March 4, 1983 (1984); Steelworkers v. Weber, 44 U.S. 480 (1979).

[3] Board of Education v.Harris, 444 U.S. 130 (1979) (Emergency School Aid Act); Guardian Association v. Civil Service Commission, 463 U.S. 582 (1982) (Title VI)

There are a number of Supreme Court decisions which, although they originally arose out of a civil rights controversy were resolved by the Court on another basis, were disposed of in a manner not relevant to the attached tables. In categorizing cases for the tables, some judgment calls were at times required, but they did not affect the overall pattern revealed by the study.

Yours sincerely,

Elaine R. Jones

Eric Schnapper

Enclosures

cc: The Honorable Joseph R. Biden
The Honorable Edward M. Kennedy
The Honorable Howard M. Metzenbaum

TABLE A

Rehnquist Decisions in Favor of Black Complainants

I. Unanimous Decisions

Ham v. South Carolina, 409 U.S. 524 (1973) (black criminal defendant entitled to voir dire the jurors about their racial attitudes) (9-0 opinions for defendant) (Rehnquist wrote majority opinion).

Test v. United States, 420 U.S. 28 (1975) (9-0 decision holding criminal defendant entitled to inspect jury roles to prove discrimination) (Rehnquist joined per curiam decision).

McDonnell-Douglas v. Green, 411 U.S. 792 (1973) (9-0 opinion overturning dismissal of discrimination claim and setting standards for remand) (Rehnquist joined majority opinion).

Chandler v. Roudebush, 425 U.S. 840 (1976) (9-0 decision holding that federal employee alleging discrimination entitled to trial de novo) (Rehnquist joined majority opinion).

Teamsters v. United States, 431 U.S. 324 (1976) (finding of intentional discrimination) (9-0 decision finding discrimination) (Rehnquist joined majority opinion).

Carson v. American Brands, 450 U.S. 79 (1981) (9-0 decision holding refusal to approve Title VII consent decree is an appealable order) (Rehnquist joined majority opinion).

EEOC v. Shell Oil Co., 466 U.S. 54 (1984) (9-0 decision sustaining EEOC subpoena) (Rehnquist joined concurring opinion).

Cooper v. Federal Reserve Board, 81 L. Ed. 2d 718 (1984) (8-0 decision holding rejection of class claim does not bar individual claim) (Rehnquist joined majority opinion).

University of Tennessee v. Elliott, 54 USLW 5084 (1986) (9-0 decision holding that unreviewed state administrative proceedings do not have preclusive effect on Title VII claims) (Rehnquist joined majority opinion).

Bazemore v. Friday, 54 USLW 4972 (1986) (9-0 decision holding that under Title VII the defendant Extension Service had a duty to eradicate salary disparities between white and black workers that originated prior to the effective date of Title VII). (Rehnquist joined with majority).

U.S. v. Scotland Neck Board of Education, 407 U.S. 484 (1972) (creation of separate school district prevented desegregation) (9-0 opinion finds new district unconstitutional) (Rehnquist joined concurring opinion).

Norwood v. Harrison, 413 U.S. 455 (1973) (9-0 decision holds states may not provide textbooks to segregated private schools) (Rehnquist joined majority opinion).

Milliken v. Bradley, 418 U.S. 717 (1974) (9-0 opinion upholding remedial programs for segregated school system) (Rehnquist joined majority opinion).

White v. Regester, 412 U.S. 755 (1973) (9-0 opinion held that at-large plan unconstitutionally diluted votes of blacks and hispanics) (Rehnquist joined majority opinion).

Connor v. Waller, 421 U.S. 656 (1975) (8-0 decision holding redistricting plan is subject to § 5 of Voting Rights Act) (Rehnquist joined majority opinion).

Briscoe v. Bell, 432 U.S. 404 (1977) (9-0 holding state cannot challenge § 5 coverage) (Rehnquist joined majority opinion).

Connor v. Coleman, 440 U.S. 612 (1979) (8-1 decision directing district court to frame redistricting plan) (dissenter would have granted stronger remedy) (Rehnquist joined majority opinion).

Blanding v. DuBose, 454 U.S. 393 (1982) (9-0 decision holding letter was not request for preclearance within meaning of § 5) (Rehnquist's separate opinion concurred in the result but denounced § 5).

McCain v. Lybrand, 465 U.S. 236 (1983) (9-0 decision holding mailing of statute to Attorney General did not constitute § 5 submission absenting request for preclearance) (Rehnquist concurred in judgment).

NAACP v. Hampton County, 84 L. Ed 2d 124 (1985) (9-0 decision holding election law changes subject to § 5) (Rehnquist concurred in judgment).

Hunter v. Underwood, 85 L. Ed. 2d 222 (1985) (8-0 decision holding state law disenfranchising misdemeanants unconstitutional due to racial purpose) (Rehnquist wrote majority opinion).

Thornburg v. Gingles, 54 USLW 4877 (1986) (9-0 decision upholding § 2 challenge to general at-large districts) (Rehnquist joined majority opinion as to those districts, but urged adoption of staneard more favorable to defendants)

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) (9-0 decision holding whites may challenge exclusion of blacks under Title VIII) (Rehnquist joined majority opinion).

Hills v. Gautreaux, 425 U.S. 284 (1976) (8-0 decision upholding authority of district court to order multi-city housing remedy) (Rehnquist joined majority opinion).

Havens Realty v. Coleman, 455 U.S. 363 (1981) (9-0 decision holding "testers" can sue under Title VIII) (Rehnquist joined majority opinion).

Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431 (1973) (9-0 decison holding exclusion of blacks from swimming pool violates § 1982) (Rehnquist joined majority opinion).

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (9-0 decision limits use of city facilities by segregated schools) (Rehnquist joins majority opinion).

Kush v. Rutledge, 460 U.S. 719 (1983) (9-0 decision holding § 1985(2) does not require allegation of racial animus) (Rehnquist joined majority opinion).

Palmore v. Sidoti, 466 U.S. 429 (1984) (9-0 decision holding state cannot deny custody of child because mother married a black) (Rehnquist joined majority opinion).

Burnett v. Grattan, 82 L. Ed. 2d 36 (1984) (9-0 decision rejecting 6-month limitation period for filing § 1983 complaint) (Rehnquist wrote concurring opinion).

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (9-0 decision holding that an employee's statutory right to trial de novo under Title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement) (Rehnquist joined majority opinion)

II. Non-unanimous Decisions

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (7-1 decision holding employer testing unlawful, and requiring back pay in most Title VII cases) (Rehnquist joined majority and filed concurring opinion).

United Jewish Organizations v. Carey, 430 U.S. 144 (1977) (7-1 decision upholding district lines drawn in race conscious manner to comply with § 5) (Rehnquist joined majority opinion).[1]

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[1] In Patsy v. Florida Board of Regents, 457 U.S. 496 (1982), Justice Rehnquist joined 6-3 majority holding that exhaustion of administrative remedies is not required under § 1983. Although this precedent is helpful to plaintiffs presenting Civil Rights claims, the plaintiff in Patsy was a white alleging reverse discrimination.

TABLE B

Cases in Which Justice Rehnquist Cast Deciding Vote

Mayor v. Educational Equality League, 415 U.S. 604 (1974) (5-4 decision holding plaintiffs failed to prove racial discrimination in the selection of city officials) (Rehnquist joined in majority opinion).

Delaware College v. Ricks, 449 U.S. 250 (1980) (5-4 decision construing Title VII such that plaintiffs charge was untimely) (Rehnquist joined majority opinion).

American Tobacco Co. v. Patterson, 71 L. Ed. 2d 748 (5-4 decision holding that § 703(h) is not limited to seniority systems adopted before the effective date of the Act.) (Rehnquist was in majority).

Guardians Association v. Civil Service Commission, 463 U.S. 582 (1982) (5-4 decision holding only injunction but not damages can be awarded under Title VI for an employment practice with a discriminatory impact) (Rehnquist wrote concurring opinion).

Milliken v. Bradley, 418 U.S. 717 (1974) (5-4 decision rejecting interdistrict desegregation remedy) (Rehnquist joins majority opinion).

Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) (5-4 decision holding period of limitations for filing Title VII charge is tolled during consideration of grievance or arbitration)

Bazemore v. Friday, 54 USLW 4972 (1986) (5-4 decision limiting obligation of state to desegregate de jure system) (Rehnquist joined majority opinion)

Warth v. Seldin, 422 U.S. 490 (1975) (5-4 decision holding plaintiffs lack standing to challenge allegedly discriminatory zoning) (Rehnquist joined majority opinion).

California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) (4-3 decision holding challenged discriminatory practice was immune from attack) (Rehnquist joined majority opinion).

Allen v. Wright, 82 L. Ed. 2d 556 (1984) (5-3 decision holding black parents lack standing to challenge grant of tax exempt status to segregated private schools) (Rehnquist joined majority opinion).

City of Richmond v. United States, 422 U.S. 358 (5-3 decision that annexation plan did not violate § 5) (Rehnquist joined majority opinion).

Beer v. United States, 425 U.S. 130 (1976) (5-3 decision holding § 5 prohibits only retrogressive election law changes) (Rehnquist joined majority opinion).

Rizzo v. Goode, 423 U.S. 362 (1976) (5-3 decision holding plaintiffs failed to prove sufficient incidents of police brutality towards blacks to justify injunction) (Rehnquist wrote majority opinion).

Arlington Heights v. Metro Housing Corp., 429 U.S. 252 (1977) (5-3 decision holding plaintiff had not proved refusal of rezoning was racially motivated) (Rehnquist joined majority opinion).

TABLE C

Cases In Which Members of Supreme Court Disagreed as to the Interpretation or Application of a Twentieth Century Civil Rights Statute

(1) Title VI

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (5-4 decision holding medical school admission plan violated Title VI) (Rehnquist joined in concurring opinion).

Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983) (5-4 decision holding only injunction but not damages can be awarded under Title VI for an employment practice with a discriminatory impact) (Rehnquist wrote concurring opinion).

Bazemore v. Friday, 54 USLW 4972 (1986) (5-4 decision limiting obligation of state to desegregate de jure system) (Rehnquist joined majority opinion).

(2) Title VII - Race

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (6-3 decision holding that filing of a Title VII charge does not toll the § 1981 limitations period) (Rehnquist joined majority opinion).

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (7-1 decision holding employer testing unlawful and requiring back pay in most Title VII cases) (Rehnquist joined majority and filed concurring opinion).

Franks v. Bowman Transportaiton Co., 424 U.S. 747 (1976) (5-3 decision holding that minorities denied a job are entitled to make whole seniority relief) (Rehnquist joined dissenting opinion).

Washington v. Davis, 426 U.S. 229 (1976) (6-2 decision rejecting Title VII claim of discrimination) (Rehnquist joined majority opinion)

National Education Association v. South Carolina, 434 U.S. 102 (1978) (5-2 decision holding Title VII not violated by teacher examination disqualifyiing 83% of all black teachers but only 17.5% of whites) (Rehnquist joined summary affirmance).

Brown v. GSA, 425 U.S. 820 (1976) (6-2 decision holding Title VII precludes all other remedies for employment discrimination against federal employees) (Rehnquist joined majority opinion).

Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 299 (1976) (5-4 decision holding period of limitations for filing Title VII charge is not tolled during consideration of grievance or arbitration).

Teamsters v. United States, 431 U.S. 324 (1976) (7-2 decision holding employers may use seniority system that perpetuates the effect of past discrimination) (Rehnquist joined majority opinion).

Hazelwood School District v. United States, 433 U.S. 299 (1977) (8-1 decision holding that plaintiff made out a prima facie case of discrimination but defendant entitled to adduce more evidence) (Rehnquist joined majority opinion) (Court of Appeals found discrimination and was reversed)

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) (7-2 decision reversing Court of Appeals finding of discrimination) (Rehnquist wrote majority opinion).

New York Transit Authority v. Beazer, 440 U.S. 568 (1979) (6-3 and 5-4 decision reversing district court finding of Title VII violation) (Rehnquist joined majority opinion).

Steelworkers v. Weber, 443 U.S. 480 (1979) (5-2 decision upholding voluntary affirmative action plan) (Rehnquist wrote dissenting opinion).

California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) (4-3 decision holding challenged discriminatory practice was immune from attack) (Rehnquist joined majority opinion).

Delaware College v. Ricks, 449 U.S. 250 (1980) (5-4 decision construing Title VII such that plaintiffs charge was untimely) (Rehnquist joined majority opinion).

Connecticut v. Teal, 457 U.S. 440 (1982) (5-4 decision holding Title VII applies to any subpart of a selection procedure with a disparate impact) (Rehnquist joined dissenting opinion).

Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) (6-3 decision holding filing with court of EEOC right-to-sue letter does not toll period of limitations) (Rehnquist joined majority).

Firefighters v. Stotts, 81 L. Ed 2d 483 (1984) (6-3 decision holding district could not modify a Title VII consent decree to require racially-based layoffs) (Rehnquist concurred in majority opinion).

Sheetmetal Workers v. EEOC, 54 LW 4984 (1986) (5-4 decision upholding court ordered affirmative action in Title VII case) (Rehnquist wrote dissenting opinion).

Firefighters v. Cleveland (July 1986) (6-3 decision upholding Title VII affirmative action settlement) (Rehnquist wrote dissenting opinion).

American Tobacco Co. v. Patterson, 456 U.S. 63 (5-4 decision holding that § 703(h) is not limited to seniority systems adopted before the effective date of the Act) (Rehnquist joined majority opinion).

(3) Title VII - Sex/National Origin/Religion

Cecilia v. Espinoza, 414 U.S. 86 (1973) (8-1 decision holding Title VII does not forbid discrimination on ground of alienage) (Rehnquist joined majority opinion) (National origin)

General Electric v. Gilbert, 429 U.S. 125 (1976) (6-3 decision holding Title VII permits exclusion of pregnancy related disability benefits from disability plans) (Rehnquist wrote majority opinion) (sex)

United Airlines v Evans, 431 U.S. 553 (1977) (7-2 decision holding Title VII does not forbid application of seniority system that perpetuates effects of past Title VII violation) (Rehnquist joined majority opinion) (sex)

Trans World Airlines v. Hardison, 432 U.S. 63 (1977) (7-2 decision holding that Title VII did not require employer to accommodate religious needs of employee) (Rehnquist joined majority opinion) (religion)

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977) (7-2 decision holding Title VII establishes no limitation period for EEOC initiated enforcement action) (Rehnquist wrote dissenting opinion) (sex)

Dothard v. Rawlinson, 433 U.S. 321 (1977) (8-1 decision finding Title VII violation as to non-contact positions; Rehnquist concurring opinion adopted intermediate standard) (7-2 decision holding Title VII not violated as to contact position; Rehnquist joined majority opinion) (sex)

Los Angeles Department of Water v. Manhart, 435 U.S. 702 (1978) (6-2 decision holding unlawful under Title VII smaller pensions for female employees) (Rehnquist joined dissenting opinion) (sex)

Board of Trustees v. Sweeney, 439 U.S. 24 (1978) (5-4 decision vacating district court finding of unlawful intentional discrimination) (Rehnquist joined majority opinion) (sex)

Davis v. Passman, 442 U.S. 228 (1979) (5-4 decision holding exclusion of Congressional employees from Title VII coverage did not bar sex discrimination claim by such employees under § 1331) (Rehnquist joined dissenting opinions) (sex)

General Telephone v. EEOC, 446 U.S. 318 (1980) (5-4 decision holding EEOC may seek class-wide relief under Title VII without resort to rule 23) (Rehnquist joined dissenting opinion) (sex)

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) (6-3 decision establishing more stringent interpretation of deadline for filing Title VII charge) (Rehnquist joins majority opinion) (religion)

Washington v. Gunther, 452 U.S. 161 (1981) (5-4 decision holding Title VII forbids employer to set lower salary for a job because the position is held by women) (Rehnquist wrote dissenting opinion) (sex)

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) (5-4 decision holding adverse determination of State law discrimination claim precludes litigation of Title VII claim) (Rehnquist joined majority opinion) (National origin-Religion)

Ford Motor Company v. EEOC, 458 U.S. 219 (1982) (6-3 decision limiting back pay where defendant employer makes certain job offers) (Rehnquist joined majority opinion) (sex)

Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) (5-4 decision holding Manhart violated by employer offering only discriminatory third party pension plans) (Rehnquist joined dissenting opinion) (sex)

Meritor Savings Bank v. Vinson, 54 USLW 4703 (1986) (5-4 establishing limits on employer legal responsibility under Title VII for sexual harassment by supervisors) (Rehnquist wrote majority opinion) (sex)

(4) Title VIII

Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979) (7-2 decision holding city and certain individuals can sue under § 812 of Title VIII) (Rehnquist wrote dissenting opinion, limiting § 812 to "direct victims" of discrimination).

(5) Title IX

Cannon v. University of Chicago, 441 U.S. 677 (1979) (6-3 decision holding there is a private right of action under Title IX) (Rehnquist wrote concurring opinion).

North Haven Board of Education v. Bell, 456 U.S. 512 (1982) (6-3 decision holding employment discrimination is covered by Title IX) (Rehnquist joined dissenting opinion).

Grove City College v. Bell, 465 U.S. (6-2 decision limiting scope of Title IX coverage) (Rehnquist joined majority opinion).

(6) Voting Rights Act

Taylor v. McKeithen, 407 U.S. 191 (1972) (districting allegedly gerrymandered to prevent election of blacks) (5-3 decision orders appellate court to explain why it overturned district court order for plaintiff) (Rehnquist wrote dissenting opinion).

Georgia v. United States, 411 U.S. 528 (1973) (6-3 decision holding Attorney General can reject § 5 submission if state fails to establish nondiscriminatory purpose and effect) (Rehnquist joined dissenting opinion).

NAACP V. New York, 413 U.S. 345 (1973) (7-2 decision denies NAACP right to intervene in section 5 bailout suit) (Rehnquist joined majority opinion).

City of Richmond v. United States, 422 U.S. 358 (5-3 decision that annexation plan did not violate § 5) (Rehnquist joined majority opinion).

Beer v. United States, 425 U.S. 130 (1976) (5-3 decision holding § 5 prohibits only retrogressive election law changes) Rehnquist joined majority opinion)

Morris v. Gressette, 432 U.S. 491 (1977) (7-2 decision holding Attorney General's refusal to object under § 5 not subject to judicial review) (Rehnquist joined majority opinion).

United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978) (6-3 decision holding § 5 applies to political subdivisions as well as to states) (Rehnquist joined dissenting opinion).

Wise v. Lipscomb, 437 U.S. 535 (1978) (6-3 decision holding Dallas redistricting not subject to § 5) (Rehnquist wrote concurring opinion).

Dougherty County v. White, 439 U.S. 32 (1978) (5-4 decision holding board of education rule subject to § 5) (Rehnquist joined dissenting opinion).

United States v. Mississippi, 444 U.S. 1050 (1980) (6-3 decision rejecting challenge to redistricting plan under § 5) (Rehnquist joined majority opinion).

City of Mobile v. Bolden, 446 U.S. 55 (1980) (6-3 decision holding at-large elections did not violate § 2) (Rehnquist joined majority opinion).

City of Rome v. United States, 446 U.S. 156 (1980) (6-3 decision holding city election law change subject to § 5) (Rehnquist wrote dissenting opinion holding Voting Rights Act unconstitutional as applied).

McDaniel v. Sanchez, 452 U.S. 130 (1981) (7-2 decision holding reapportionment subject to § 5) (Rehnquist joined dissenting opinion urging § 5 did not apply).

Hathorn v. Lovorn, 457 U.S. 255 (1982) (8-1 decision holding state courts can enforce § 5) (Rehnquist wrote dissenting opinion).

Rogers v. Lodge, 458 U.S. 613 (1982) (6-3 decision finding at-large election plan adopted for unconstitutional racially discriminatory purpose) (Rehnquist joined dissenting opinion).

Port Arthur v. United States, 459 U.S. 159 (1982) (6-3 decision holding redistricting plan violated § 5) (Rehnquist joined dissenting opinion).

Lockhart v. United States, 460 U.S. 175 (1983) (6-3 decision holding election plan did not violate § 5) (Rehnquist joined majority opinion).

Thornburg v. Gingles, 54 USLW 4877 (1986) (6-3 division as to standard for proving § 2 standard) (Rehnquist concurred in result but joined concurring opinion proposing standard more favorable to defendants).

(7) Discrimination Against Disabled

State School v. Halderman, 451 U.S. 1 (1981) (6-3 decision holding § 6010 of Developmentally Disabled Assistance and Bill of Rights Act creates no legally enforceable rights) (Rehnquist wrote majority opinion).

Board of Education v. Rawley, 458 U.S. 176 (1982) (6-3 decision holding Education for All Handicapped Children Act does not require sign language interpreter for deaf child) (Rehnquist wrote majority opinion).

Community Television v. Gottfried, 459 U.S. 498 (1983) (6-3 decision holding FCC is not obligated to consider station's compliance with §504 in renewing license) (Rehnquist joined majority opinion).

Atascaden State Hospital v. Scanlon, 87 L. Ed. 2d 171 (1985) (5-4 decision holding a plaintiff can never obtain damages against a state for violation of § 504) (Rehnquist joined majority opinion).

U.S. Department of Transportation v. Paralyzed Veterans, 54 USLW 4854 (6-3 decision holding that airline using federally-assisted airports may discriminate against the handicapped despite § 504) (Rehnquist joined majority opinion).

(8) Age Discrimination In Employmnet Act

United Airlines, Inc. v. McMann, 434 U.S. 92 (1977) (6-3 decision holding ADEA does not prohibit mandatory retirement of 60 year old worker under bona fide pre-Act senority plan) (Rehnquist joined majority opinion)

Oscar Meyer and Co. v. Evans, 441 U.S. 750 (1979) (5-4 decision holding plaintiff need not resort to state administrative procedure prior to filing suit under ADEA) (Rehnquist joined dissenting opinion).

Lehman v. Nakshian, 453 U.S. 156 (1981) (5-4 decision holding there is no right to jury trial in an ADEA suit against the federal government) (Rehnquist joined the majority opinion).

(9) Pregnancy Discrimination Act

Newport News Shipbuilding v. EEOC, 462 U.S. 669 (1983), (7-2 decision holding Act forbids distinction in pregnancy benefits between male workers with spouses and female workers with spouses) (Rehnquist wrote dissenting opinion).

(10) Emergency School Aid Act

Board of Education v. Harris, 444 U.S. 130 (1979) (6-3 decision holding claim under Emergency School Aid Act can be based on discriminatory impact alone) (Rehnquist joined dissenting opinion).

(11) Counsel Fee Statutes

Hutto v. Finney, 437 U.S. 678 (1978) (5-4 decision upholding the Court of Appeals award of attorney's fees under Civil Rights Attorney's Fees Awards Act of 1976) (Rehnquist wrote dissenting opinion).

Hanrahan v. Hampton, 446 U.S. 754 (1980) (7-1 decision denying fees under 1976 Attorney Fees Act for interim success) (Rehnquist joined concurring opinion).

New York Gaslight Club v. Carey, 447 U.S. 54 (1980) (7-2 decision upholding the award of attorney's fees in a Title VII action to successful complaining party for services in state administrative and judicial proceedings) (Rehnquist joined dissenting opinion).

Maine v. Thiboutot, 448 U.S. 1 (1980) (6-3 decision holding that 1976 Attorney's Fees Act applies to all litigation under § 1983) (Rehnquist joined dissenting opinion)

Hughes v. Rowe, 449 U.S. 5 (1980) (7-2 decision holding Attorney's Fees Act did not authorize award against prison inmate) (Rehnquist wrote dissenting opinion).

Hensley v. Eckerhart, 461 U.S. 424 (1983) (5-4 decision establishing standards for determining the size of fee award under 1976 Attorney's Fee Act) (Rehnquist joined majority opinion).

Pulliam v. Allen, 466 U.S. 522 (1984) (5-4 decision holding judicial immunity not a bar to award of attorney's fees under 1976 Attorney's Fee Act) (Rehnquist joined dissenting opinion).

Webb v. Board of Education, 471 U.S. (1985) (6-2 decision holding that attorney's fees are not available under 1976 Attorney's Fee Act for time spent on optional administrative proceedings prior to filing civil rights action under § 1983) (Rehnquist joined majority opinion).

Evans v. Jeff D., 54 USLW 4359 (1986) (6-3 decision holding that Court may approve civil rights class action settlement provision for plaintiffs' waiver of claim for attorney's fees under 1976 Attorney's Fees Act) (Rehnquist joined majority opinion).

Riverside v. Rivera, 54 U.S.L.W. 4845 (5-4 decision upholding District Court's award of attorney's fees under 1976 Attorney's Fees Act) (Rehnquist wrote dissenting opinion).

Library of Congress v. Shaw, 54 U.S.L.W. 4951 (1986) (6-3 opinion holding no interest is available on fee awards against Federal agencies under Title VII) (Rehnquist joined majority opinion).

Pennsylvania v. Delaware Valley Clean Air Counsel, 54 U.S.L.W. 5017 (1986) (6-3 opinion holding that the lower courts apply § 304(d) Clean Air Act) (Rehnquist joined majority opinion).

Senator MATHIAS. I have just one question. I do not solicit your views on racial covenants because I know each of you so well that I could, I am sure, predict what you would say.

I would like to put this hypothetical question to you, and I have to make it hypothetical because of the state of the record at this point. I cannot make it more specific.

Would you think there is a difference between the acceptance of a deed containing racial covenants, and making a deed containing racial covenants?

Mr. HOOKS. I would have to say at the outset yes, but if I may just make one further statement. I had practiced law before I assumed my present position, a long time. I have owned maybe one or two pieces of property, and I must confess that most deeds have a boilerplate language in them, and I do not always read it carefully.

But one of the things I learned in law school and from the first lawyer I practiced with, if anything is typed in, you had better read that because you do not know that, but what they may give with one hand they may take with the other. And I do not know of any lawyer, if you want to talk about brilliance and competence, then I would have to question a lawyer who would take a deed, take or give a deed that contained a restrictive covenant that is typed in. And my understanding is in the *Vermont* case that was typed in. And most lawyers, as Congressman Weiss said this morning, look very carefully at anything that is typed into a printed form or that is rubbed out or erased, because that is usually where the changes are made. And I think that, while there is a difference, it is still not that much different between my accepting a deed that has a restrictive covenant and my giving a deed. Because in both cases, I think, I am more than a passive participant.

Senator MATHIAS. Thank you all for being here. It is a great pleasure.

Senator KENNEDY. Mr. Chairman, just one point of information. Up our part of the country, Mr. Hooks, up in Vermont, Massachusetts, when you buy land up there, you know, it is stone fence to stone fence. Robert Frost wrote about that so eloquently. And people that buy land up in our part of the country in those rural back areas really take a good look at what those covenants or what those titles are. Because it goes back 200, sometimes 300 hundred years. And the first thing that they tell you up our way is you had better make sure, you had better get a good look, better get a hard look at some of these matters.

It may be different in other parts of the country, but I must say that most of the people up our way usually take a very hard and thorough look at these matters before they put their money down.

Senator MATHIAS. Senator Mitchell.

Mr. MITCHELL. Mr. Chairman, just in response, and I had just gotten to this point when my time ran out on my initial statement. The point of perception and the message that this sends, which is extremely important during these times, we are increasing our numbers of black elected officials throughout the country, making the effort to participate in the process. The message that it sends is I guess best summed up by a young black entrepreneur from California whose name was John Grayson, who said that one of the problems that confused him was why black religious fundamentalists and white religious fundamentalists basically believed in the same things but ended up on opposite ends. He said he finally with his computer training boiled it down to the fact of role models, and that he discovered that blacks, by and large, had adopted as a role model Jesus, who was all-forgiving, turned the other cheek, love thy brother and that sort of thing; but that white religious fundamentalists had adopted the role model of God.

Now, God will send a flood on you. God will punish you if you do wrong. And so we find ourselves now in a situation where we are sending a message by the attempted appointment of a Sessions, by the attempted nomination of this kind of Supreme Court Chief Justice nominee that even blacks now ought to maybe change role models and begin to adopt the role models of the white religious fundamentalists who will punish you when you do wrong and deal with you in that way.

So I think that legalities are fine but also perception, and the message you send is crucially important at this time.

The CHAIRMAN. Any more questions from anybody?

[No response.]

The CHAIRMAN. Thank you, members of the panel, very much for your appearance here and your testimony.

We will now call the next panel: Ms Susan Nicholas, Women's Law Project; Mr. John Silard, Judicial Selection Project; Ms. Irene Natividad, National Women's Political Caucus.

Senator BIDEN. Mr. Chairman, I would like to respectfully suggest, although I am anxious to hear their testimony, that time is running out. I would respectfully suggest since they were unable to be here last night—is that correct?

Mr. SHORT. This is part of panel six.

Senator BIDEN. This is part of panel six I requested for today last night?

Mr. SHORT. Yes, sir, that is correct.

Senator BIDEN. I did that, did I?

Mr. SHORT. Yes, sir.

Senator BIDEN. I thought you would tell me that. As much as I want to hear your testimony, I want to make sure where we are with regard to the witnesses that have come all the way from Arizona so that we do not run out of time without those witnesses having an opportunity to testify. And unless any of my colleagues on my side object, I would respectfully suggest that we would hold this panel to determine whether or not we have the time after the witnesses from Arizona. Because the worst of all worlds would be for them to have flown here——

Senator METZENBAUM. May I suggest a compromise?

Senator BIDEN. Sure.

Senator METZENBAUM. What if we just gave each of these witnesses 3 minutes to speak and we all of us waived our opportunity to question.

Senator BIDEN. A good idea.

Senator METZENBAUM. Before we do that, Mr. Chairman, I had spoken with Duke before about the witnesses coming forth and perhaps meeting in the back room. We do not know who they are. We have not had a chance to talk with them, and I think it would be helpful if the staff on both sides have a chance to at least meet the witnesses. If you would be good enough to request them to do that, Mr. Chairman, I would appreciate it.

The CHAIRMAN. No objection. We will do that.

Senator BIDEN. All the Arizona witnesses come around the back. Just meet in the back room.

Senator METZENBAUM. All of the witnesses from out of town, Arizona, California.

The CHAIRMAN. You may proceed.

TESTIMONY OF PANEL CONSISTING OF IRENE NATIVIDAD, NATIONAL WOMEN'S POLITICAL CAUCUS, AND JOHN SILARD, JUDICIAL SELECTION PROJECT

Ms. NATIVIDAD. Mr. Chairman and members of the committee, I too would like to hear the Arizona witnesses, but I thank you for giving me this opportunity to speak to you today.

The CHAIRMAN. You might state your name and who you represent.

Ms. NATIVIDAD. I am Irene Natividad. I am chair of the National Women's Political Caucus which is a nationwide bipartisan organization with 77,000 members and 300 State and local caucuses.

Our primary work is to gain equal representation for women in elective and appointed office, and we speak out on issues of direct concern to women.

As was said before, and which I would like to underline, women's full rights as citizens are dependent on the Supreme Court's interpretations of the due process clause and equal protection clauses of the 14th amendment and of laws passed by Congress. This is important for all of us to note because, as was said before and which needs repetition, women do make up the majority of the people in this country.

It is for this reason that we in the National Women's Political Caucus oppose the nomination of Justice William Rehnquist to be Chief Justice of the Supreme Court. His opinions on cases coming before the Court betray a consistent bias against equality for women under the law that prevents him from applying his seemingly brilliant intellectual and analytical powers in an objective fashion to cases related to sex discrimination.

Furthermore, it is our view that his opinions portray an attitude which is out of sync, to use the vernacular, with the reality faced by women nowadays.

A 19th century mind set about women has no place in the 21st century where we know we will still see Justice Rehnquist.

Our complete testimony is on file and it cites a number of cases in which Justice Rehnquist interpreted the 14th amendment and title VII very narrowly and very often to the disadvantage of women.

In the short time I am allotted, I will discuss a couple of pregnancy discrimination cases which illustrate my point.

One of the realities of the 20th century American woman is that she works outside the home, many times because she has to, so that we now comprise 44 percent of the labor force.

The capacity to bear children is the chief reason given in the past for restricting women's opportunity in the areas of employment, and while not articulated openly nowadays by employers, it is still a major reason.

I consider the impact of pregnancy discrimination invidious, to use Justice Rehnquist's own adjectives yesterday, as invidious as racial discrimination.

The *Cleveland Board of Education* v. *Le Fleur* and *Cohen* v. *Chesterfield* are cases involving school board regulations that required pregnant teachers to go on leave 4 or 5 months prior to their due date. In Cleveland, teachers could not return to duty until the regular semester after the child was 3 months old.

Now, you can imagine the impact of these regulations on the pocketbooks of these very women who needed money at that time.

Seven Justices found these regulations in violation of the 14th amendment. Justice Rehnquist dissented, criticizing primarily the Court's resting its invalidation of the regulation on the due process clause rather than equal protection law which he thought would be more appropriate.

It is interesting that Justice Powell, who did rest his concurrence with the majority opinion on the very same equal protection clause, found the regulation irrational. Justice Powell observed that the record, and I am quoting him here, "abound with proof that a principal reason behind the adoption of the regulation was to keep visibly pregnant teachers out of the sight of young children."

Senator HATCH. Ms. Natividad, your time has expired.

We will put your full statement in the record.

Ms. NATIVIDAD. Thank you very much.

[Statement follows:]

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TESTIMONY OF

IRENE NATIVIDAD

CHAIR, NATIONAL WOMEN'S POLITICAL CAUCUS

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

ON THE NOMINATION OF WILLIAM REHNQUIST FOR CHIEF JUSTICE

JULY 29, 1986

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY. I AM IRENE NATIVIDAD, CHAIR OF THE NATIONAL WOMEN'S POLITICAL CAUCUS, A NATIONWIDE, MULTIPARTISAN ORGANIZATION WITH 77,000 MEMBERS IN 300 STATES AND LOCAL CAUCUSES. WE WORK TO WIN FOR WOMEN EQUAL REPRESENTATION IN ELECTIVE AND APPOINTIVE OFFICE AND WE SPEAK OUT ON ISSUES OF DIRECT CONCERN TO WOMEN. WOMEN'S FULL RIGHTS AS CITIZENS ARE DEPENDENT ON THE SUPREME COURT'S INTERPRETATIONS OF THE DUE PROCESS CLAUSE AND EQUAL PROTECTION CLAUSE AND OF LAWS PASSED BY CONGRESS.

WE OPPOSE THE NOMINATION OF JUSTICE WILLIAM REHNQUIST TO BE CHIEF JUSTICE OF THE SUPREME COURT. HIS OPINIONS ON CASES COMING BEFORE THE COURT BETRAY A BIAS AGAINST EQUALITY FOR WOMEN UNDER THE LAW THAT PREVENTS HIM FROM APPLYING HIS REPUTEDLY BRILLIANT INTELLECTUAL AND ANALYTICAL POWERS IN AN OBJECTIVE FASHION TO CASES RELATED TO SEX DISCRIMINATION.

THE OPINION IN GENERAL ELECTRIC COMPANY V. GILBERT, 429 U.S. 125 (1976), WHICH HE WROTE, IGNORED CONSERVATIVE PRINCIPLES OF JUDICIAL INTERPRETATION AND PRECEDENTS OF THE COURT TO REACH A CONCLUSION ADVERSE TO EMPLOYED WOMEN. THE OPINION IS NOT CLEAR, CONCISE, AND LOGICAL AS ONE WOULD EXPECT FROM A JUSTICE OF HIS REPUTED INTELLECT. FORTUNATELY THE CONGRESS CORRECTED THIS DECISION WITH THE PREGNANCY DISCRIMINATION ACT OF 1978, 42 U.S.C. §2000(k), BUT IT DOES NOT HAVE THE POWER TO CHANGE JUSTICE REHNQUIST'S ATTITUDES.

THE QUESTION IN THIS CASE WAS WHETHER EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM A DISABILITY INSURANCE PLAN THAT COVERED ALL OTHER DISABILITIES CONSTITUTED SEX DISCRIMINATION IN VIOLATION OF TITILE VII OF THE CIVIL RIGHTS ACT OF 1964. NOT ONLY DID THE BENEFIT PLAN EXCLUDE PREGNANCY-RELATED DISABILITIES, THE COMPANY IN SOME CASES REQUIRED WOMEN TO CEASE EMPLOYMENT THREE MONTHS PRIOR TO BIRTH AND EIGHT WEEKS FOLLOWING DELIVERY. WHILE ON LEAVE FOR PREGANACY-RELATED DISABILITIES, COVERAGE UNDER THE PLAN CEASED SO THAT UNRELATED DISABILITIES ARISING DURING THE LEAVE WERE NOT COVERED. PLAN COVERAGE CONTINUED FOR 31 DAYS IN THE CASE OF PERSONAL LEAVE, LAYOFF, OR STRIKE.

ALTHOUGH THIS ISSUE HAD BEEN BEFORE SIX CIRCUIT COURTS OF APPEAL AND ALL HAD FOUND THE EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM SUCH PLANS VIOLATIVE OF TITLE VII, JUSTICE REHNQUIST DISAGREED.

NOT ONLY DID THIS DECISION IGNORE CONSERVATIVE PRINCIPLES OF JUDICIAL INTERPRETATION AND COURT PRECEDENTS , IT FLEW IN THE FACE OF COMMON SENSE. PREGNANCY AND THE POTENTIALITY OF PREGNANCY HAVE BEEN THE CHIEF RATIONALE IN THE PAST FOR DISCRIMINATION AGAINST WOMEN IN EMPLOYMENT AND EDUCATION.

THE OPINION QUOTES EXTENSIVELY FROM GEDULDIG V. AIELLO, 417 U.S. 484 (1974), WHICH JUSTICE REHNQUIST CONSIDERED CONTROLLING FOR DETERMINING WHETHER SEX DISCRIMINATION EXISTED, ALTHOUGH IT INVOLVED A STATE DISABILITY INSURANCE SYSTEM CHALLENGED UNDER THE 14th AMENDMENT. FOLLOWING ARE EXCERPTS FROM THE PORTIONS HE QUOTED:

> WHILE IT IS TRUE THAT ONLY WOMEN CAN BECOME PREGNANT, IT DOES NOT FOLLOW THAT EVERY LEGISLATIVE CLASSIFICATION CONCERNING PREGNANCY IS A SEX-BASED CLASSIFICATION...NORMAL PREGNANCY IS AN OBJECTIVELY IDENTIFIABLE PHYSICAL CONDITION WITH UNIQUE CHARACTERISITICS.
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> . . . . . .
>
> THE LACK OF IDENTIY BETWEEN THE EXCLUDED DISABILITY AND GENDER AS SUCH UNDER THIS INSURANCE PROGRAM BECOMES CLEAR UPON THE MOST CURSORY ANALYSIS. THE PROGRAM DIVIDES POTENTIAL RECIPIENTS INTO TWO GROUPS - PREGNANT WOMEN AND NONPREGNANT PERSONS. WHILE THE FIRST GROUP IS EXCLUSIVELY FEMALE, THE SECOND INCLUDES MEMBERS OF BOTH SEXES.
>
> . . . . . .
>
> THERE IS NO RISK FROM WHICH MEN ARE PROTECTED AND WOMEN ARE NOT. LIKEWISE, THERE IS NO RISK FROM WHICH WOMEN ARE PROTECTED AND MEN ARE NOT.

I SUBMIT THIS IS FACILE REASONING, WHICH OBFUSCATES THE ISSUE RATHER THAN CLARIFYING IT. "NORMAL PREGNANCY" IS NOT THE SUBJECT OF THE SUIT - PREGNANCY-RELATED DISABILITIES ARE. PREGNANCY-RELATED DISABILITIES AS THEY RELATE TO EMPLOYMENT ARE NOT "UNIQUE." CHILDBIRTH AND COMPLICATIONS OF PREGANANCY ARE CHARACTERIZED BY THE INABLILITY TO PERFORM REGULAR DUTIES WITH THE PATIENT UNDER THE CARE OF A PHYSICIAN OR OTHER HEALTH PROFESSIONAL AND USUALLY IN A HOSPITAL. HOW IS THIS DIFFERENT FROM OTHER DISABILITIES?

HIS GROUPING OF RECIPIENTS IGNORES THE FACT THAT MOST OF THE WOMEN IN THE SECOND GROUP HAVE THE POTENTIAL FOR BECOMING PREGNANT. A MORE LOGICAL GROUPING WOULD BE WOMEN, WHO HAVE THE POTENTIAL TO BECOME PREGNANT, AND MEN WHO DO NOT. WOULD JUSTICE REHNQUIST HAVE USED AN ANALAGOUS GROUPING IF SICKLE CELL ANEMIA HAD BEEN THE EXCLUDED DISABILITY?

HERE IS A FURTHER EXAMPLE OF HIS REASONING (NOT QUOTED FROM GEDULDIG):

> PREGNANCY IS OF COURSE CONFINED TO WOMEN, BUT IT IS IN OTHER WAYS SIGNIFICANTLY DIFFERENT FROM THE TYPICAL COVERED DISEASE OR DISABILITY. THE DISTRICT COURT FOUND IT IS NOT A "DISEASE" AT ALL, AND IS OFTEN A VOLUNTARILY UNDERTAKEN AND DESIRED CONDITION.

HERE AGAIN THE OPINION USES LANGUAGE TO OBSCURE THE ISSUE. THE ISSUE RELATES TO PREGANACY-RELATED DISABILITIES RATHER THAN PREGNANCY. HE DOES NOT SPECIFY HOW PREGNANCY-RELATED DISABILITIES ARE "SIGNIFICANTLY DIFFERENT" FROM THE "TYPICAL COVERED DISEASE OR DISABILITY." AS INDICATED ABOVE, WE FIND NO DIFFERENCES IN EMPLOYMENT RELATED CIRCUMSTANCES. THE CLAUSE ABOUT "DISEASE" IS TOTALLY IRRELEVANT.

AS FOR PREGNANCY BEING "VOLUNTARY," IT OFTEN IS NOT. IN ANY EVENT, MORE TO THE POINT, THE GE PLAN COVERED OTHER VOLUNTARY DISABILITIES, SUCH AS ELECTIVE COSMETIC SURGERY, ATTEMPTED SUICIDE, SPORT INJURIES, AND DISABILITIES INCURRED IN THE COMMISSION OF A CRIME OR DURING A FIGHT. IT COVERED ALL DISABILITES PECULIAR TO MEN AND ALL PECULIAR TO WOMEN EXCEPT PREGNANCY-RELATED DISABILITIES.

IN ORDER TO REACH THE CONCLUSION THAT THE EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM THE TEMPORARY DISABILITY INSURANCE PLAN OF GE DID NOT VIOLATE TITLE VII, JUSTICE REHNQUIST HAD TO DEAL WITH A GUIDELINE OF THE EQUAL EMPLOYMENT

OPPORTUNITY COMMISSION ISSUED IN 1972, WHICH PROVIDED THAT "DISABILITES CAUSED OR CONTRIBUTED TO BY PREGNANCY...ARE FOR ALL JOB-RELATED PURPOSES, TEMPORARY DISABILITES...(UNDER) ANY HEALTH OR TEMPORARY DISABILITY INSURANCE OR SICK LEAVE PLAN..."

HE DISCOUNTED THE GUIDELINE, CONTRARY TO SUPREME COURT PRECEDENTS, WHICH HAD GIVEN EEOC GUIDELINES "GREAT DEFERENCE," BECAUSE IT WAS ISSUED SEVEN YEARS AFTER THE ACT WAS PASSED AND INTERIM LETTERS BY EEOC'S GENERAL COUNSEL EXPRESSED THE VIEW THAT PREGNANCY IS NOT NECESSARILY INCLUDABLE AS A COMPENSABLE DISABILITY. AS JUSTICE BRENNAN POINTS OUT IN HIS DISSENT, A STUDY OF THE ISSUE BY THE CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN (A PRESIDENTIALLY-APPOINTED ADVISORY GROUP) RESULTED IN A RECOMMENDATION IN 1970 THAT CHILD BEARING AND COMPLICATIONS OF PREGNANCY BE TREATED FOR JOB-RELATED PURPOSES LIKE ALL OTHER DISABILITIES. THE STUDY FOUND THAT FOR JOB-RELATED PURPOSES, SUCH DISABILITIES ARE NOT DIFFERENT FROM OTHER DISABILITIES.

AS JUSICE BRENNAN POINTS OUT IN HIS DISSENT:

> THEREFORE, WHILE SOME SEVEN YEARS HAD ELAPSED PRIOR TO THE ISSUANCE OF THE 1972 GUIDELINE, AND EARLIER OPINION LETTERS HAD REFUSED TO IMPOSE LIABILITY ON EMPLOYERS DURING THIS PERIOD OF DELIBERATION, NO ONE CAN OR DOES DENY THAT THE FINAL EEOC DETERMINATION FOLLOWED THROUGH AND WELL INFORMED CONSIDERATION...IT IS BITTER IRONY THAT THE CARE THAT PRECEDED PROMULGATION OF THE 1972 GUIDLINE IS TODAY CONDEMNED BY THE COURT AS TARDY INDECISIVENESS, ITS UNWILLINGNESS IRRESPONSIBLY TO CHALLENGE EMPLOYERS' PRACTICES DURING THE FORMATIVE PERIOD IS LABELLED AS EVIDENCE OF INCONSISTENCY, AND THIS INDECISIVENESS AND INCONSISTENCY ARE BOOTSTRAPPED INTO REASONS FOR DENYING THE COMMISSION'S INTERPRETATION ITS DUE DEFERENCE.

> FOR ME, THE 1972 REGULATION REPRESENTS A PARTICULARY CONSCIENTIOUS AND REASONABLE PRODUCT OF EEOC DELIBERATIONS AND, THEREFORE, MERITS OUR "GREAT DEFERENCE." CERTAINLY, I CAN FIND NO BASIS FOR CONCLUDING THAT THE REGULATION IS OUT OF STEP WITH CONGRESSIONAL INTENT...ON THE CONTRARY, PRIOR TO 1972, CONGRESS ENACTED JUST SUCH A PREGNANCY-INCLUSIVE RULE TO GOVERN THE DISTRIBUTION OF BENEFITS FOR "SICKNESS" UNDER THE RAILROAD UNEMPLOYMENT INSURANCE ACT. 45 U.S.C. § 351 (K)(2). FURTHERMORE, SHORTLY FOLLOWING THE ANNOUNCEMENT OF THE EEOC'S RULE, CONGRESS APPROVED AND THE PRESIDENT SIGNED AN ESSENTIALLY IDENTICAL PROMULGATION BY THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972...

ALSO ALARMING IS JUSTICE REHNQUIST'S IMPLICATION IN THE LAST PARAGRAPH OF THE DECISION THAT CONGRESS INTENDED THAT THE FOURTEENTH AMENDMENT STANDARD OF DISCRIMINATION BE APPLIED TO SEX DISCRIMINATION UNDER TITLE VII. THIS STATEMENT IS CONTRARY TO A LONG LINE OF PRECEDENT CASES AND INDICATES A FRAME OF MIND HOSTILE TO ANY MEANINGFUL INTERPRETATION OF TITLE VII IN SEX DISCRIMINATION CASES. IT INDICATES A BELIEF THAT SEX DISCRIMINATION SHOULD BE INTERPRETED DIFFERENTLY FROM RACE DISCRIMINATION. (SEE OUR FOLLOWING DISCUSSION OF JUSTICE REHNQUIST'S VIEWS ON THE FOURTEENTH AMENDMENT AND SEX DISCRIMINATION.)

JUSTICE REHNQUIST RAN INTO DIFFICULTY IN APPLYING HIS RATIONALE IN GILBERT TO THE NEXT CASE INVOLVING SEX DISCRIMINATION BECAUSE OF PREGNANCY - NASHVILLE GAS CO. V. SATTY, 434 U.S. 136 (1977). IN THIS CASE, THE EMPLOYER NOT ONLY EXCLUDED PREGNANCY-RELATED DISABILITIES FROM ITS SICK LEAVE PLAN, IT ALSO DENIED WOMEN RETURNING TO EMPLOYMENT THEIR ACCUMULATED SENIORITY, WHEREAS EMPLOYEES ON LEAVE FOR ANY OTHER DISABILITY RETAINED SENIORITY AND CONTINUED TO ACCRUE SENIORITY WHILE ON LEAVE. WOMEN RETURNING TO EMPLOYMENT

AFTER CHILDBIRTH WERE TREATED AS NEW APPLICANTS FOR PURPOSES OF BIDDING ON JOBS. THE JUSTICE"S FACILE MIND WAS EQUAL TO THE TASK. HE HELD IN THE MAJORITY OPINION:

> HERE, BY COMPARISON (WITH GILBERT), PETITIONER HAS NOT MERELY REFUSED TO EXTEND TO WOMEN A BENEFIT THAT MEN CANNOT AND DO NOT RECEIVE, BUT HAS IMPOSED ON WOMEN A SUBSTANTIAL BURDEN THAT MEN NEED NOT SUFFER. THE DISTINCTION BETWEEN BENEFITS AND BURDENS IS MORE THAN ONE OF SEMANTICS. 434 U.S. AT 142

JUSTICE STEVENS IN HIS CONCURRING OPINION POINTS UP THE DIFFICULTY OF THE DISTINCTION:

> THE GENERAL PROBLEM IS TO DECIDE WHEN A COMPANY POLICY WHICH ATTACHES A SPECIAL BURDEN TO THE RISK OF ABSENTEEISM CAUSED BY PREGNANCY IS A PRIMA FACIE VIOLATION OF THE STATUTORY PROHIBITION AGAINST SEX DISCRIMINATION. THE ANSWER "ALWAYS," WHICH I HAVE THOUGHT QUITE PLAINLY CORRECT IS FORECLOSED BY THE COURT"S HOLDING IN GILBERT. THE ANSWER "NEVER" WOULD SEEM TO BE DICTATED BY THE COURT'S VIEW THAT A DISCRIMINATION AGAINST PREGNANCY IS "NOT A GENDER-BASED DISCRIMINATION AT ALL." THE COURT HAS, HOWEVER, MADE IT CLEAR THAT THE CORRECT ANSWER IS "SOMETIMES." 434 U.S.at 153

IN A FOOTNOTE, JUSTICE STEVENS NOTES THAT DIFFERENCES BETWEEN BENEFITS AND BURDENS CANNOT PROVIDE A MEANINGFUL TEST OF DISCRIMINATION, SINCE, BY HYPOTHESIS, THE FAVORED CLASS IS ALWAYS BENEFITED AND THE DISFAVORED CLASS IS EQUALLY BURDENED.

THE CONGRESS RESCUED THE COURT FROM JUSTICE REHNQUIST'S MORASS WITH THE PREGNANCY DISCRIMINATION ACT IN 1978, WHICH DEFINES SEX DISCRIMINATION TO INCLUDE DISCRIMINATION BECAUSE OF PREGNANCY, CHILDBIRTH, AND RELATED

MEDICAL CONDITIONS. IT FURTHER PROVIDES THAT "WOMEN AFFECTED BY PREGNANCY, CHILDBIRTH OR RELATED MEDICAL CONDITIONS SHALL BE TREATED THE SAME FOR ALL EMPLOYMENT RELATED PURPOSES, INCLUDING RECEIPT OF BENEFITS UNDER FIRING BENEFIT PROGRAMS, AS OTHER PERSONS NOT SO AFFECTED BUT SIMILAR IN THEIR ABILITY OR INABILITY TO WORK." 42 U.S.C. s 2000(k)

THE ENACTMENT OF THE PREGNANCY DISCRIMINATION ACT DOES NOT ALLAY OUR FEARS ABOUT JUSTICE REHNQUIST'S ATTITUDES CONCERNING SEX DISCRIMINATION. THE FACT THAT HE COULD PERSUADE SIX JUSTICES TO JOIN HIM IN A DECISION BASED ON SOPHISTRY, CONTRARY TO COMMON SENSE AND TO THE DECISIONS OF SIX CIRCUIT COURTS OF APPEAL, AND IN DISREGARD OF CONSERVATIVE PRINCIPLES OF LEGAL INTERPRETATION IS ALARMING.

JUSTICE REHNQUIST'S 1983 DISSENT IN NEWPORT NEWS V. EEOC, 462 U.S. 669, INDICATES NO CHANGE IN ATTITUDE HE INTERPRETED THE PREGNANCY DISCRIMINATION ACT VERY NARROWLY IGNORING EEOC GUIDELINES. THE EEOC INTERPRETATION WAS PUHELD BY THE COURT 7 - 2.

I URGE EVERY MEMBER OF THIS COMMITTEE TO READ THE GILBERT DECISION IN ITS ENTIRETY.

JUSTICE REHNQUIST'S OPINIONS ON CASES CHALLENGING SEX DISCRIMINATORY LAWS UNDER THE FOURTEENTH AMENDMENT ARE ALSO ALARMING. SINCE 1971, WHEN FOR THE FIRST TIME, THE SUPREME COURT FOUND A GENDER-BASED LAW UNCONSTITUTIONAL, REED V. REED, 404 U.S. 71, THE COURT HAS BEEN STRUGGLING TO FIND A STANDARD OF EQUAL PROTECTION ANALYSIS SUITABLE FOR GENDER-BASED CLASSIFICATIONS. JUSTICE REHNQUIST HAS BEEN A DESTRUCTIVE CRITIC. HE HAS NOT EVEN BEEN WILL-

ING TO OVERTURN LAWS THAT ARE CLEARLY DISCRIMINATORY UNDER THE TRADITIONAL RATIONAL BASIS STANDARD.

IN FORNTIERO V. RICHARDSON, 411 U.S. 677 (1973), HE WAS THE ONLY DISSENTER. THIS CASE CHALLENGED THE CONSTITUTIONALITY OF A FEDERAL LAW THAT PROVIDED THAT SPOUSES OF MALE MEMBERS OF THE ARMED SERVICES ARE DEPENDENTS FOR PURPOSES OF INCREASED QUARTERS ALLOWANCES AND MEDICAL AND DENTAL BENEFITS BUT THAT SPOUSES OF FEMALE MEMBERS ARE NOT DEPENDENTS UNLESS THEY ARE IN FACT DEPENDENT FOR OVER ONE-HALF OF THEIR SUPPORT. THE ONLY JUSTIFICATION WAS ADMINISTRATIVE CONVENIENCE.

EIGHT JUSTICES FOUND THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT. JUSTICE REHNQUIST DISSENTED, STATING ONLY THAT HE AGREED WITH THE DECISION OF THE LOWER COURT, WHICH HAD HELD THERE WAS A RATIONAL CONNECTION BETWEEN THE CLASSIFICATION AND A LEGITIMATE GOVERNMENTAL END.

JUSTICE REHNQUIST ALSO DISSENTED IN CLEVELAND BOARD OF EDUCATION V. LA FLEUR AND COHEN V. CHESTERFIELD COUNTY, 414 U.S. 632 (1974). THESE CASES INVOLVED SCHOOL BOARD REGULATIONS THAT REQUIRED PREGNANT TEACHERS TO GO ON LEAVE 4 OR 5MONTHS PRIOR TO THE DUE DATE. IN CLEVELAND THE TEACHER COULD NOT RETURN TO DUTY UNTIL THE NEXT REGULAR SEMESTER AFTER THE CHILD WAS 3 MONTHS OLD.

SEVEN JUSTICES FOUND THE REGULATIONS IN VIOLATION OF THE FOURTEENTH AMENDMENT. JUSTICE REHNQUIST DISSENTED, CRITICIZING PRIMARILY THE COURT'S RESTING ITS INVALIDATION OF THE REGULATIONS ON THE DUE PROCESS CLAUSE IN-

STEAD OF THE EQUAL PROTECTION CLAUSE. HOWEVER, JUSTICE REHNQUIST DID NOT JOIN IN A SEPARATE CONCURRING OPINION OF JUSTICE POWELL, WHO RESTED HIS CONCURRENCE ON THE EQUAL PROTECTION CLAUSE, FINDING THE REGULATIONS "IRRATIONAL." JUSTICE POWELL OBSERVED THAT THE RECORDS "ABOUND WITH PROOF THAT A PRINCIPAL REASON BEHIND THE ADOPTION OF THE REGULATIONS WAS TO KEEP VISIBLY PREGNANT TEACHERS OUT OF THE SIGHT OF SCHOOL CHILDREN." THE SCHOOL BOARDS ATTEMPTED AFTER THE FACT TO JUSTIFY THE REGULATIONS ON THE NEED FOR CONTINUITY OF TEACHING, A VALID OBJECTIVE. BUT THE REGULATIONS DID NOT PROMOTE CONTINUITY, REQUIRING TEACHERS TO QUIT IN THE MIDDLE OF A SEMESTER WHEN THEY OTHERWISE WOULD HAVE BEEN ABLE TO COMPLETE IT BEFORE THE DUE DATE.

JUSTICE REHNQUIST WAS THE LONE DISSENTER, WITHOUT A WRITTEN OPINION, IN TURNER V. DEPARTMENT OF EMPLOYMENT SECURITY, 423 U.S. 44(1975), INVOLVING A UTAH STATUTE MAKING PREGNANT WOMEN INELIGIBLE FOR UNEMPLOYMENT BENEFITS FOR A PERIOD EXTENDING FROM 12 WEEKS BEFORE EXPECTED DATE OF CHILDBIRTH UNTIL SIX WEEKS AFTER WITH A PRESUMPTION THEY WERE UNAVAILABLE FOR WORK. THE COURT HELD THE LAW NOT CONSTITUTIONALLY VALID SINCE MOST WOMEN ARE ABLE TO WORK.

JUSTICE REHNQUIST DISSENTED IN CRAIG V. BOREN, 429 U.S. 190 (1976), WHICH ESTABLISHED A NEW STANDARD OF REVIEW FOR GENDER-BASED LAWS: "GENDER-BASED CLASSIFICATIONS MUST SERVE IMPORTANT GOVERNMENTAL OBJECTIVES AND MUST BE SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF THOSE OBJECTIVES." THE PLAINTIFF CHALLENGED AN OKLAHOMA LAW PROHIBITING SALE OF 3.2 BEER TO MALES UNDER THE AGE OF 21 AND FEMALES UNDER THE AGE OF 18. THE COURT FOUND THE

LAW UNCONSTITUTIONAL.

JUSTICE REHNQUIST IN HIS DISSENT OBJECTED TO THE INTERMEDIATE STANDARD OF REVIEW GENERALLY AND ALSO TO APPLYING A DIFFERENT STANDARD TO CASES WHERE MALES ARE DISCRIMINATED AGAINST. HE FOUND THE LAW CONSTITUTIONAL UNDER THE STANDARD RATIONAL BASIS ANALYSIS.

JUSTICE REHNQUIST'S GREAT RELUCTANCE TO FIND GENDER-BASED LAWS UNCONSTITUTIONAL IS SOMEWHAT SURPRISING IN THE LIGHT OF TESTIMONY ON THE ERA HE GAVE IN 1971 BEFORE THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES. THERE HE SUMMARIZED THREE CASES BEFORE THE SUPREME COURT CHALLENGING SEX-BASED LAWS UNDER THE FOURTEENTH AMENDMENT AND SPOKE WITH SEEMING APPROVAL OF AT LEAST A MODEST EXPANSION OF THE APPLICATION OF THE FOURTEENTH AMENDMENT:

> RECENT LOWER COURT DECISIONS HAVE TAKEN A BROADER VIEW OF THE 14th AMENDMENT'S PROHIBITIONS IN THIS AREA, AND IT MAY WELL BE THAT THE SUPREME COURT WILL LIKEWISE BROADEN ITS PAST INTERPRETATIONS IN THIS AREA. CERTAINLY EVEN A MODEST EXPANSION OF THE 14th AMENDMENT DECISIONS DEALING WITH SEX WOULD OBVIATE THE MORE EGREGIOUS FORMS OF DIFFERENCES OF TREATMENT WHICH RESULT FROM GOVERNMENTAL ACTIONS. WITH THIS PROSPECT OF EXPANDED CONSTITUTIONAL PROTECTION OF WOMEN'S RIGHTS WITHOUT THE NECESSITY OF AN ADDED CONSTITUTIONAL PROVISION, THE COMMITTEE MIGHT CONCLUDE THAT IT SHOULD AWAIT RESOLUTION OF THE CASES BEFORE IT BY THE SUPREME COURT OF THE UNITED STATES...

WE ARE PARTICULARY ALARMED BY JUSTICE REHNQUIST'S VIEWS ON ABORTION. HE FINDS NO RIGHT TO PRIVACY IN THE CONSTITUTION AND WOULD REVERSE ROE V. WADE. HE HAS VOTED AT EVERY OPPORTUNITY TO RESTRICT ABORTION RIGHTS. OTHER WITNESSES WILL PROVIDE DITAILS ON THESE DECISIONS. ROE V. WADE HAS

EXTRAORDINARILY GREAT MEANING FOR WOMEN; REVERSAL WOULD BE A TRAGEDY.

IN SUMMARY, WE OPPOSE THE ELEVATION OF JUSTICE REHNQUIST TO CHIEF JUSTICE, WHERE HE WOULD HAVE MORE INFLUENCE THAN HE NOW HAS. HIS OPINIONS IN SEX DISCRIMINATION CASES INDICATE THAT HE IS RIGIDLY ATTACHED TO THE PAST VIEW OF WOMEN AS SECOND CLASS CITIZENS. WHEREAS OTHER JUSTICES, THE EXECUTIVE BRANCH, THE LEGISLATIVE BRANCH, AND MOST STATE GOVERNMENTS HAVE RESPONDED POSITIVELY TO WOMEN'S LEGITIMATE DEMANDS FOR FULL CITIZENSHIP, HE HAS NOT.

JUSTICE REHNQUIST'S OPINIONS IN SEX DISCRIMINATION CASES ARE NOT CLEAR, CONCISE, AND WELL REASONED AS ONE WOULD EXPECT FROM HIS REPUTATION FOR LEGAL BRILLIANCE. THEY OFTEN OBFUSCATE OR AVOID THE SUBSTANTIVE ISSUES. HE USES HIS BRILLIANCE TO TORTURE THE LAW TO FIT HIS CONCLUSIONS. WE CAN ONLY CONCLUDE THAT HIS BIASES GET IN THE WAY OF CLEAR, LOGICAL ANALYSIS. HE HAS MORE OFTEN THAN NOT PLAYED THE ROLE OF DISSENTER AND CRITIC, SOMETIMES WITH LITTLE GRACE.

BASED ON HIS RECORD, WE DO NOT BELIEVE HE CAN COALESCE A CENTRIST MAJORITY THAT WOULD HAVE DUE REGARD FOR LEGAL EQUALITY FOR WOMEN.

Senator HATCH. You are very articulate.

Mr. Silard.

STATEMENT OF JOHN SILARD

Mr. SILARD. I am John Silard for the judicial selection project of the Alliance for Justice. And we are here to make a point that has not, so far as I can tell, been made to this committee before.

Senator METZENBAUM. Could you tell us, Mr. Silard, what is the Alliance for Justice?

Mr. SILARD. Well, it is a group of organizations that has come together a year or two ago to concentrate exclusively on the question of judicial appointments. The members are listed on our statement for the committee to know.

Senator METZENBAUM. Start his time running now.

Mr. SILARD. The first necessary qualification of a person appointed to head an organization is that he or she supports the organizational role and mission. Justice Rehnquist lacks that qualification for he strongly objects to the central constitutional role of the Supreme Court as it has developed over the past 200 years.

His opposition is clear and undisguised, and it leads him merely always to vote against the Bill of Rights and against civil rights, and for State's rights.

In my brief time, I can quote only this much from his opinion.

In the Richmond newspapers where the eight Justices said open trial was a constitutional right, he says, Rehnquist says, quite candidly, "It is basically unhealthy to have so much authority concentrated in a small group of lawyers." He means the Supreme Court.

Nothing in the reasoning of Mr. Justice Marshall in *Marbury* required this Court to broaden the use of the supremacy clause to smother a healthy pluralism which would otherwise exist in a national government and facing 50 States. He does not believe in the Bill of Rights and in the 14th amendment as charters of protection against State action because, as he puts it, it smothers a healthy pluralism in our society.

A case, such as *Carter* v. *Kentucky,* in which he dissents alone once more, demonstrates his point. Eight Justices say that a defendant who has not taken the stand exercising his right to silence, may have the jury instructed not to take his exercise of his constitutional right against him. Now, Justice Rehnquist never takes issue that the jury, in the absence of that instruction, might convict simply because the defendant chose his right to silence, nor does he assert any State interest to squelch a proper instruction to the jurors. He simply says we cannot interfere with trial judges' decisions on instructions to jurors. He is an abolitionist when it comes to the Bill of Rights and the 14th amendment as charters to restrain State violation of human rights.

Now, such a person cannot lead. It is a General who says, gentlemen—on his horse he says soldiers, advance to the rear. And that is where Justice Rehnquist is. He is candid in saying so. He does not think we have gone in the right direction in the last 50 years. But, as long as he is on the Court, he can atone that position, he is an inappropriate Chief Justice.

May I, Mr. Chairman, answer one question I was asked before about the 54 lone dissents?

The point of the 54 lone dissents is not just that there are 54, but that Justice Rehnquist always, I mean always comes up against the Federal Constitution on these 54 occasions. And he does so in expressing his view not the proper role of the Supreme Court to give force to the Bill of Rights and the 14th amendment.

He just is entirely inappropriate. He cannot lead the charge because he does not believe in the battle.

And that is the conclusion of my testimony, Mr. Chairman.

[Statement follows:]

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Women's Legal Defense Fund

TESTIMONY OF THE

JUDICIAL SELECTION PROJECT

ON THE NOMINATION OF

WILLIAM H. REHNQUIST

AS CHIEF JUSTICE OF THE UNITED STATES

JULY 29, 1986

A Project of the Alliance for Justice

Participating Alliance Members: Business and Professional People for the Public Interest; Center for Law and Social Policy; Center for Law in the Public Interest; Center for National Policy Review; Center for Public Representation; Center for Science in the Public Interest; Education Law Center; Employment Law Center; Equal Rights Advocates; Food Research and Action Center; Institute for Public Representation; Juvenile Law Center of Philadelphia; Mental Health Law Project; National Education Association; NOW Legal Defense and Education Fund; National Women's Law Center; Native American Rights Fund; New York Lawyers for the Public Interest; Public Advocates, Inc.; Sierra Club Legal Defense Fund; Women's Law Project; Women's Legal Defense Fund

My name is John Silard, and I am testifying on behalf of the Judicial Selection Project of the ALliance for Justice. I appreciate the opportunity to appear before this Committee today.

The Judicial Selection Project is a coalition of lawyers, academics, and representatives of civil rights, labor and public interest organizations that was formed in January 1985 to monitor appointments to the federal courts. The Project reviews nominees' backgrounds on issues such as their records on equity and fairness, committment to equal justice, pro bono activities, and other matters that reflect on judicial temperament or professional competence. We believe that maintaining a strong, independent judiciary is essential to our democratic system.

In our nearly two hundred year history as a nation, Chief Justices of the United States have been of various views and persuasions. Never before, however, has a jurist been proposed for the sensitive role of Chief who questions the basic constitutional function of the Supreme Court and who has put himself far outside the spectrum of views held by the other members of the Court he is being proposed to lead. In case after case, Justice WIlliam H. Rehnquist has consistently applied his preference for judicial abstention rather than vindication of constitutional guarantees, particularly those contained in the Bill of Rights. He has thus aligned himself over and over again against federal protection for racial and religious minorities, aliens, criminal defendants, and the poor and disadvantaged.

One central question which the Judicial Selection Project believes the Senate must address on the pending nomination is whether it is appropriate to elevate to the role of Chief Justice a jurist who so clearly rejects the constitutional function of the Supreme Court and whose beliefs are so far beyond the spectrum of views of the other Justices. The office of Chief Justice calls for an individual who believes in the role of the Court as it has developed over the last two hundred years and whose views are somewhere within the spectrum of views embraced by the other eight Justices. To suggest that Justice Rehnquist cannot meet these two requirements is not, of course, to say that he is unqualified to be a sitting member of the Court. However, considerations of respect for the Court as an institution and of the leadership role of the Chief Justice are dispositive in a case such as this, for national interests far beyond a nominee's mere legal qualifications are necessarily presented by the choice of a Chief Justice.

More than fifty lone dissents by Justice Rehnquist from rulings by the rest of the Court attest how far he has placed himself from his colleagues. These fifty lone dissents against the Court's interpretations of constitutional and statutory rights in a wide variety of circumstances bespeak Justice Rehnquist's truly extreme position, as underscored by the fact that in all of these cases he has opposed not only the liberals and moderates but also such genuine conservatives as Justices Burger and O'Connor. Indeed, Justice Rehnquist's lone dissents do not merely reflect a "conservative" philosophy, but a rejection of the central constitutional role of the Supreme Court as an institution.

Three historical propositions are at the heart of the developed role of the Supreme Court in our society as guardian of the federal Constitution. First, there was Chief Justice Marshall's landmark decision in Marbury v. Madison, which conclusively confirmed the power of the Supreme Court to uphold the federal Constitution. A vital part of this governing principle is the role of the Supreme Court in protecting the basic liberties of the powerless against infringement by the political majorities which may control other branches of government. A second crucial proposition is that espoused by the Supreme Court almost 200 years ago in McCulloch v. Maryland. This historic "supremacy" case established the vital concept that national interests must predominate over state choices in areas of national constitutional concern. With some candor, Justice Rehnquist has challenged the bedrock principles of both Marbury and McCulloch when they call for members of the Supreme Court to provide federal constitutional protections.

A third premise underlying our democratic society is the incorporation doctrine, which through the Fourteenth Amendment guarantees our basic liberties against infringement by the states. Time and again, however, Justice Rehnquist rejects the fundamental Bill of Rights protections incorporated in the Constitution's first ten amendments. Almost never does he find within the Bill of Rights meaningful protections against violations of free speech and press, due process, cruel and unusual punishment, and religious freedom. Nor does he find protection against invidious discrimination by the state. He advocates wide latitude for the states, even where it can be shown that officials are violating cherished federal constitutional rights.

Justice Rehnquist's idiosyncratic position may be illustrated by a review of even a few of his many lone dissents.

It would be hard to imagine a constitutional guarantee historically more profound than that against government support for racial discrimination, but in Justice Rehnquist's view there is no constitutional restraint on such conduct by either the Congress or the States. In the Court's decision in Bob Jones University v. United States, 461 U.S. 574 (1983), Chief Justice Burg found that racially exclusive schools are not entitled to the tax-exempt status of charitable organizations under the Internal Revenue Code. The Court stated that "racial discrimination in education violates deeply and widely accepted views of elementary justice," and that the elimination of such discrimination is a national policy embodied in the Internal Revenue Code.

Justice Rehnquist's sole dissent is a technical exercise in statutory construction, concluding that Congress intended to give the benefit of tax deduction even for donations to racially segregating schools. There is the remarkable further conclusion that the Constitution permits Congress to grant tax exemptions to organizations that discriminate on the basis of race absent a showing of a discriminatory purpose by Congress. This startling conclusion demonstrates Rehnquist's view that the Constitution provides little or no restraint upon actions which injure fundamental principles of freedom and equality.

Justice Rehnquist's lone dissent in Keyes v. School District No. 1, 413 U.S. 189 (1973), similarly illustrates this point. He protests any requirement of affirmative desegregation where there had been segregation practices without a system-wide segregation rule. Nowhere does he make clear the basis for his constitution-defeating position that desegregation can be required where there has been a formal written rule, but not where purposeful segregation practices have been pursued by the school authorities.

The unwillingness to protect the rights of minorities extends to aliens, illegitimate children, native Americans, members of religious minorities and other examples of the most powerless in our society. In Sugarman v. Dougall, 413 U.S. 634 (1973), eight Justices struck down a law which limited employment in the state's civil service to United States citizens. In so ruling, the Court affirmed that aliens are entitled to protection from invidious discrimination under the Fourteenth Amendment. Justice Rehnquist alone rejected the conclusion, stating "aliens as a class are not familiar with how we as individuals treat others and how we expect government to treat us." He argued that the Fourteenth Amendment was not designed to protect any "discrete and insular minorities" other than racial minorities.

Illegitimate children fare no better under Justice Rehnquist's nullifying view of the Constitution. In Jimenez v. Weinberger, 417 U.S. 628 (1978), the opinion of Chief Justice Burger for eight members of the Court found unconstitutional a statute which excluded illegitimate children from public welfare benefits. The opinion emphasizes that visiting the condemnation of the parents' misconduct on the head of an innocent child is illogical and unjust. Imposing disabilities on the innocent children "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."

Justice Rehnquist dissents alone, finding a rational basis for the exclusion of illegitimate children's benefits. He wrote that the Court should not strike down legislative decisions for the sole reason that they treat some group of individuals less favorably than others. Nowhere does he address the Burger opinion's rejection of the outmoded view that illegitimate children are undeserving. Apparently the mere possibility of false benefit claims is enough for Justice Rehnquist to approve wholesale state exclusion of illegitimate children from public benefits.

Zablocki v. Redhail, 434 U.S. 374 (1978), involved a state law requiring prior approval for marriage for persons under court orders of support for minor children. The Supreme Court struck down the law and reaffirmed the fundamental character of the right to marry. Justice Rehnquist, however, viewed the law as a "permissible exercise of the state's authority to regulate", even though he concedes that it would make marriage financially impossible for a segment of the population. Thus, Justice Rehnquist would permit the state to regulate even where it interferes with one of the most intimate and fundamental personal freedoms, and does so in the case of a statute that particularly singles out the poor, who are most commonly the subject of orders for support of minor children.

These dissents illustrate the great lengths Justice Rehnquist goes to in deferring to states when it comes to individual rights. In _Sugarman_, he rejects application of the Equal Protection clause to suspect classes other than race. Governmental action is upheld even if it denies aliens government employment or harms illegitimate children, women or the poor, who, like many blacks, are powerless and vulnerable.

Justice Rehnquist advances states' rights through application of the abstention doctrine. A theme which runs throughout these dissents is the notion that federal courts should not interfere with state proceedings even where constitutional issues are concerned.

Justice Rehnquist also votes to limit or nullify the impact of the First Amendment on the states. _Thomas v. Review Board_, 450 U.S. 707 (1981). The opinion, written by Chief Justice Burger, barred a state from denying unemployment compensation to a Jehovah's Witness who had refused to perform military procurement work. Justice Burger emphasized that where "the State conditions receipt of an important benefit upon conduct proscribed by a religious faith ... thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."

Justice Rehnquist, arguing alone for untrammelled state power, writes that the state need not "conform that statute to the dictates of religious conscience of any group." In sum, Justice Rehnquist would approve, state laws that make denial of state benefits the price for exercising an employee's genuine religious views.

On the other hand, where the state wanted to allow religious interference with secular concerns, Justice Rehnquist alone found no First Amendment problem. In Larkin v. Grendel's Den, 459 U.S. 116 (1982), eight Justices found a state law giving churches the power to forbid bars in their vicinity to be an improper delegation of governmental licensing authority. Justice Burger, writing for the Court, stated that "the structure of our government has, for the preservation of civil liberty, rescued temporal institutions from religious interference." Justice Rehnquist disregarded the constitutionally forbidden entanglement of church and state, instead protesting the "heavy First Amendment artillery that the Court fires at this sensible and unobjectionable" statute.

Justice Rehnquist was also the only member of the Court who would have allowed a state to deny a prisoner the right to practice his religion. In Cruz v. Beto, 405 U.S. 319 (1972), eight members of the Court held that it violated the First Amendment for prison officials to deny a Buddhist the same opportunity to practice his faith as those prisoners who followed more conventional religions. Justice Rehnquist took the position that the Court should not interfere with the prison officials unless the discrimination could not be justified under any rational hypothesis. Because it could cost more to provide religious services for small sects, Justice Rehnquist found it reasonable for the state to deny the right to worship to members of those sects. This dissent again reveals Justice Rehnquist's troubling precept that Bill of Rights guarantees as fundamental as that of religious freedom bow merely to the interest of the state's convenience and cost.

In other cases involving criminal justice, Justice Rehnquist has given broad rights to the state and a denial of constitutional protection to the individual. In Taylor v. Louisiana, 419 U.S. 522 (1975), only Justice Rehnquist would have allowed the state to continue a jury system which excluded women, a group which comprises over half the population. He was the sole justice to dissent from the Court's ruling that the Fourth Amendment bars a state patrolman from randomly stopping and searching automobiles without any warrant or cause to believe that a violation of law is occurring. Delaware v. Prouce, 440 U.S. 648 (1979).

In Carter v. Kentucky, 450 U.S. 288 (1981), eight Justices agreed that a criminal defendant not testifying in his own defense is constitutionally entitled to have the jury instructed that it may draw no inference from his exercise of the right to remain silent. The opinion underscored (305) that a "failure to limit the jurors' speculation on the meaning of that silence . . . exacts an impermissible toll on the full and free exercise of the privilege." The constitutional right against forced testimony by defendant, the Court noted (299), "reflects many of our most fundamental values and most noble aspirations . . . "

Rehnquist's lone dissent is noteworthy for its failure to suggest why the defendant's right to silence should not be protected by a "no inference" instruction to the jury, without which a defendant's exercise of his right to silence might often become the very basis of jury conviction. Rehnquist protests allowing the defendant to "take from the trial judge any control over the instructions . . . " This dissent again fails to deal with the specific assertion upon which the majority opinion is based; instead, it simply finds vindication of that constitutional right and undue intrusion on the discretion of the state courts. Viewed as Justice Rehnquist views it as merely a matter of state authority -- not even of any strongly asserted state counter-interest -- it becomes clear that Justice Rehnquist basically does not accept Marbury when it comes to the preservation of Bill of Rights guarantees.

Justice Rehnquist also differed from his colleagues in a historic case involving openness of criminal trials, Richmond Newspapers v. Commonwealth of Virginia, 448 U.S. 555 (1980). The majority opinion by Chief Justice Burger struck down a state court order closing a criminal trial to the public and the press, calling openness "one of the essential qualities of a court of justice." Never pausing to refute the persuasive historical evidence set forth in the majority opinion, Justice Rehnquist instead voices in lone dissent an abstentionist principle so broad as to encompass not only public trials, but essentially all Bill of Rights guarantees. He illustrates his hostility to judicial review, stating that:

> to rein in, as the Court has done over the past generation, all of the decision-making power over how justice shall be administered . . . is a task that no Court consisting of nine persons, however gifted, is equal to . . . it is basically unhealthy to have so much authority concentrated in a small group of lawyers . . . nothing in the reasoning of Mr. Justice Marshall in Marbury v. Madison requires that this Court, through ever-broadening use of the Supremacy Clause, smother a healthy pluralism which would otherwise exist in a national government embracing 50 States.

It is particularly noteworthy how far Justice Rehnquist proceeds to rely on this broad abstentionist principle rather than on any effort to justify the secret trial which offends Anglo-American traditions.

Even in cases involving the most fundamental right, Justice Rehnquist would defer to the states. In Lockett v. Ohio, 438 U.S. 586 (1978), the opinion by Chief Justice Burger struck down a state statute which precluded a defendant from showing any aspect of his character or record in mitigation on the question of the sentence in a capital case. The Court found that the statute created the risk that the death penalty would be imposed in cases where it is not appropriate, and that "when the choice is between life and death, that risk is unacceptable."

The lone dissent by Justice Rehnquist asserted that the state was not required to accept any mitigating evidence, apparently in the view that the Eighth Amendment assures no more than a fair trial of guilt or innocence. In Justice Rehnquist's view, even life itself is not a sufficiently compelling right to deserve constitutional protection against its arbitrary denial.

The foregoing brief review of a handful of Justice Rehnquist's numerous lone dissents highlights themes that are found throughout his Supreme Court opinions. What is demonstrated by his lone dissents is first of all the depth and range of his abstentionism, applying it as he would to every minority group, every Bill of Rights principle, and even to life and death questions. No constitutionally protected interest of federalism or fairness, of liberty or equality will rise to a level where Justice Rehnquist is willing to impose significant federal constitutional limitations on the states.

It is not unfair to call Justice Rehnquist an abolitionist, for the extent of his erosion of the guiding principle of Marbury v. Madison, and thereby of the constitutional protections found in the Bill of Rights, would amount to abolition of the Supreme Court's vital role and its central task: the vindication of the federal Constitution. That is not a conclusion unfairly drawn from his years on the Court; it largely reflects his own candidly stated insistence on the overriding importance of state's rights and the limits of the Supreme Court's capacity and authority.

Our concern is not only that Justice Rehnquist will continue to strike a different balance of substantive interests than the other Justices. Rather, what is at the heart of his view is a far more fundamental principle that questions the role of the the Supreme Court itself in preserving federal constitutional rights.

If this is a fair characterization of Justice Rehnquist's view, the question arises whether the Senate should elevate to the position of Chief Justice of the United States a member of the Supreme Court so out of sympathy with the basic role and function of the Court. We believe that the answer is no. Never in our history has a Chief Justice so undermined and demeaned the Supreme Court as an institution. As one who rejects the Supreme Court's central constitutional task, Justice Rehnquist is clearly an inappropriate choice to lead and represent our highest Court.

Senator HATCH. Thank you Mr. Silard.

Senator BIDEN. Thank you I apologize for the rush.

Senator HATCH. Thank you. We appreciate having you here.

And at this particular point we will take just a short recess, but let me say that the Democrats on the committee have asked for 10 witnesses at this point and we have 5 of them who are here. There are five more that we do not know where they are.

Senator METZENBAUM. Mr. Chairman, I want to say that I have been asked to read into the record the FBI affidavits in connection with some of those who could not make it. I hope you will permit me.

Senator HATCH. Those who are here are Mr. James Brosnahan, Melvin Mirkin, Charles Pine, Sidney Smity, and Manuel Pena.

Those who are not here are Quincy Hopper, Nelson McGriff, Fred LaDene, Michael Shapiro, and Arthur Ross.

Who has asked you to read out of the FBI affidavits?

Senator METZENBAUM. We have the LaDene affidavit, we have the Arthur Ross—these were given to the FBI.

Senator HATCH. Do we have copies of those affidavits?

Senator METZENBAUM. Oh, yes.

Senator HATCH. Do we have copies?

Senator METZENBAUM. Mr. Chairman, if you would rather have Duke Short read them, I have no particular——

Senator HATCH. No. We would be happy to let you read them. Which affidavits are you going to read?

Senator METZENBAUM. LaDene, Ross, McGriff——

Senator HATCH. Is there any reason why they are not here?

Senator METZENBAUM. Yes. I think Mr. LaDene says in his, I just was reading that myself, that by the nature of the interview, LaDene advised that, due to time constraints, he would prefer to be interviewed over the telephone, as he was very busy and was not going to go to Washington to testify because of his time schedule.

Now, there is one saving grace about Mr. LaDene that you should know, and that is that he was chairman of the Republican Party for Maricopa County in 1962, and I thought that would impress you.

Senator HATCH. Is he the only Republican?

Senator METZENBAUM. Well, I am not certain about that. I have not checked the politics of the others.

Senator HATCH. I have a feeling that he may be.

Is he presently a Republican?

Senator METZENBAUM. I think that he is the chairman of National——

Senator LEAHY. Can we get a blood test?

Senator HATCH. You do not have to go into that data.

Senator LEAHY. Can we get a blood test, Mr. Chairman?

Senator HATCH. That is what I was wondering!

You have got Mr. McGriff, Mr. LaDene, and Mr. Ross. Are there any others?

Senator METZENBAUM. Yes; there is Mr. Shapiro who had a death in his family. He may not be able to come.

We have requested the FBI interview him, and he should be able to testify. His father-in-law died, and we understand his mother-in-law is ill as well, his mother, I guess it is.

Senator HATCH. The only 1 remaining of the 10 witnesses is Quincy Hopper. Do you know if Quincy Hopper is here?

Senator METZENBAUM. We do not know his status yet.

Senator HATCH. All right. We have five witnesses present, one who might be present, and Quincy Hopper who may also appear.

Senator METZENBAUM. Mr. Chairman, in the interest of time, if you will, I would be willing to start reading these. But I gather you and Senator Biden are going to go into a conference, is that right?

Senator HATCH. No, I do not think so.

Let us just have a short recess.

Senator METZENBAUM. Mr. Chairman, I am not being smart, but since we are so close in time, and I think we should, but can we extend the hour, this 15-minute period?

Senator HATCH. Senator Thurmond has told me not to do that, but I feel you are going to have enough time. Let us just see what we can do to shorten the time. We will certainly do everything we can to accommodate you. However, a lot of it depends on how long you are going to interrogate.

Let me ask the other two panels that the committee has called to come to the back, if they would. Simpson Cox, Vincent Maggiore, Edward Cassidy, William Turner, Ralph Staggs, Jim Bush, Fred Robert Shaw, Gordon Marshall, and George Randolph.

If these people are here, would you come into the area behind the hearing room.

Senator LEAHY. Sir, just a moment.

Before we go, what I think was—well, Senator Biden is still here. We had, the Senator knows, because we had an agricultural matter on the floor late last night. I was bouncing back and forth between the floor and here, and had this question of what we were going to do on the material that originally had been—we were to receive from the Justice Department, and then executive privilege was invoked.

Then back on that same agricultural matter on the floor this morning, I am just curious, where do we stand now? What is the situation?

Senator HATCH. Let us just take a short recess.

[Recess].

The CHAIRMAN. I have just been informed that our negotiators on textiles in Geneva have caved in. It is a terrible situation. And I am going now to find out some more details about the facts.

I am going to ask Senator Hatch to take over in just a minute.

The commitment I had from the President in 1980, and confirmed in 1982, is that the import growth will be kept in line with the domestic growth. The import growth is 33 percent; domestic growth is 3 percent. In the last year, our exports of textiles have amounted to $3 billion; imports of textiles coming into this country and taking the jobs from our own people have amounted to $20 billion, an $18 billion differential. That is completely unreasonable. It is closing down the textile mills in this country, and it is throwing thousands of people out of jobs. There is just no excuse in this.

Now I want to say that in view of this situation, I see nothing left but to override the President's veto on this textile bill. We were hoping this arrangement they were going to work out over there would bring some relief. Instead of that I am informed that our negotiators caved in.

Senator Hatch, I am going to ask you take the chair in just a minute.

The distinguished Senator from Alabama I believe wanted to comment.

Senator HEFLIN. I have gained seniority today on textiles, because I am vitally interested in this issue. It affects thousands and thousands of jobs in my State. We have had disaster there in terms of drought, and caving in on these multifiber agreements is another great disaster to us. I do want to join Senator Thurmond in doing some investigation on it, but I will return. I have been here, and I will leave a staffperson who will hear every bit of the evidence

Senator KENNEDY. Mr. Chairman.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Will you be back at the hearing later in the course of the day?

The CHAIRMAN. Yes, I will be back

Senator KENNEDY. Because when you return, I would hope that we would have an opportunity to inquire of you whether we will have the chance to convene the full Judiciary Committee to make a judgment and a determination as to how we are going to proceed on the position that has been taken by the legal counsel's office on the willingness to deny this committee certain information, certain memoranda, certain documents.

I know you stated your position on this last evening I had not intended to raise it at this particular moment. We have had an opportunity to talk to other members of the committee. But I do feel that we have sufficient members 142 of this committee, Republican and Democrat alike, to meet the requirement of the rules of the committee, to convene the committee and find out what way we might proceed We would like to do this as a point of accommodation. I am very much aware of your strongly-held views. But we do under the committee rules have the right to request a meeting of the committee.

I want to indicate at this time, Mr. Chairman, that the extent that there was any understanding and agreement about the way our committee was going to proceed is based upon the understanding of the calling of various witnesses and the availability of various information that was going to be essential to our being able to make a judgment and make decision.

I for one would feel that stonewalling on this request by the administration and denying us the opportunity to gain this kind of information effectively vitiates my own understanding of the nature of the agreement. It may not in others, but it does mine. And I would no longer feel bound by any previous agreement. That is an independent judgment and an independent decision, but one strongly held.

But I do want to indicate as you are going off now to other meetings, that I do feel that there is very substantial support among the members of the committee not only on this side but on your side to try to find a way and a means to address the request for information. I have characterized, and I think it is myself intolerable, that there has been a denial to this committee of selected information. But I do want to indicate that I would hope when you return to be able to raise this in a more formal way if we are not able to resolve it in a more informal way to permit the committee to meet and to also work out some kind of mechanism for the obtaining of these documents.

I wanted to indicate that to the chairman now since it appears that the chairman is going to have to, for the reasons he has outlined, absent himself from chairing these particular hearings.

Senator BIDEN. Mr. Chairman, if I may for just a moment, to put it a slightly different way, we have a problem and a division on the committee. After the witnesses are finished, all the witnesses, not to bring back new witnesses, but after that is done, we really think it would be a good idea if the committee were convened for the purpose of us settling the issue of access to documents and requests for subpoena. And I would join in asking that, that we meet after the witnesses are completed.

The CHAIRMAN. Well, I cannot say that we can meet today. The administration has declared executive privilege, which they have a right to do, and so far as I am concerned, that is closed. Now, our agreement was to provide prompt production of all reasonable requests for information pertaining to the nominee. And this request, as I just said, is not reasonable. And I have already cooperated in helping to obtain all other documents that have been requested, so I see no reason to pursue this particular matter further at this time. We can consider it further——

Senator BIDEN. Mr. Chairman, let me just give you one reason. It may be that 10 members of the committee want to pursue it. That is sufficient reason. [Laughter].

And I am not being smart when I say that, I truly am not. But I think at least, before we break out of this agreement, and Senator Kennedy may or may not feel obliged to break out of the agreement that we had overall with both Justices, that before this breaks down, which we took so long to set up, why don't we at least as a committee meet, any way you want to do it, to decide whether or not under the committee rules, there are 10 people who want to subpoena. If not, then in fact, we have finished——

The CHAIRMAN. I will be back for the hearing later.

Right now, Senator Hatch will take the Chair.

Are you all ready to go ahead?

Senator BIDEN. We are all ready to go ahead. I hope we are going to add at least a half an hour onto our time for these witnesses.

The CHAIRMAN. We have not cut your time.

Senator HATCH. We have.

Senator BIDEN. Oh. Well, we recessed for about half an hour. Well, we will fight about that when the time comes. I am sure that the distinguished chairman from Utah will, as he always does, give every witness ample and fair time to testify. [Laughter].

And in fact he usually does that.

Senator HATCH [presiding]. As a matter of fact, I usually do.

Senator KENNEDY. Yes; I would hope we would. I for one, whatever process or procedures that are necessary, would be quite prepared to stay here, even if this official forum is closed, to find a room and invite members of the public as well as members of the press to listen to any of the others who do not feel that they have had sufficient time. And we are quite capable and able of doing that.

Senator HATCH [presiding]. Let us move ahead. We have important witnesses on both sides here.

As I understand it, there are five witnesses here. I am going to read the first five names. Those of us on this side of the table would have preferred to have had all these witnesses here so that they could be interrogated by both sides. It is a better thing to do, especially when we are talking about a Supreme Court Justice. The witnesses should respect this panel enough to be here. And some of them cannot. There is one who has a death in the family. We certainly understand that.

But the others, I think, could have been here. To accommodate the minority on this matter, we will call to the table the ones who are here. I will go down through the list of 10. When I reach one who is not here, I will ask the minority if they have a statement by that person, even though there will be no cross-examination. Let us also understand that. Let us all understand the weight that should be given to that. My personal feeling is that if people feel strongly about the confirmation of Justice Rehnquist they should be here, especially since the Committee would pay their expenses. They should be here. To accommodate the minority, we are going to allow Senator Metzenbaum to read a statement by some of these.

So we will call at this time to the table Mr. James Brosnahan, from Berkeley, CA; Mr. Melvin Mirkin, from Phoenix, AZ. As I understand it, Quincy Hopper has not shown up yet. Senator Metzenbaum does not have a statement for him.

Senator METZENBAUM. That is correct, Mr. Chairman.

Senator HATCH. We will strike Quincy Hopper.

Do you have a statement by Mr. Snelson McGriff from Phoenix, AZ?

Senator MATHIAS. I would hope we would not strike anybody.

Senator HATCH. All we are saying is they are not here.

Senator MATHIAS. They could turn up.

Senator HATCH. If he turns up during this time frame, of course. That is all I meant.

Do you have a statement by Mr. Snelson McGriff? Why don't you read that into the record?

Senator METZENBAUM. Well, I think, Mr. Chairman—you are very kind, and I appreciate it—I think if we hear the actual witnesses first—I have talked to some of my colleagues, and I think they would prefer that, then we could go back to those who are not present.

Senator HATCH. All right. Since Mr. Charles Pine, Mr. Sydney Smith, and Mr. Manuel Pena are here, we will call them to the stand. Mr Pine is from Phoenix, AZ, Mr. Sydney Smith is from La Jolla, CA; and Mr. Manuel Pena, from Phoenix.

We are happy to welcome all of you here

As I understand it, Senator Metzenbaum has statements from Snelson McGriff, Fred LaDene, Michael Shapiro, and Arthur Ross.

Senator METZENBAUM. Not from Michael Shapiro. We are asking the FBI to get one. He is the one who had the death in his family. But you do have statements from the other three, Mr. Chairman.

Senator HATCH. We have agreed that we will not read from FBI reports. You can read statements and give the dates of those statements.

Senator DECONCINI. Mr. Chairman, Mr. Chairman, I have not participated in any such—to proceed as I did yesterday and make statements in the record as to the source of those things—my sources——

Senator HATCH. All we have agreed to is that we will not cite the FBI reports. We can certainly read statements. The Senator knows what we are doing here. We will go through these five witnesses starting with Mr. Brosnahan and then we will move on to the affidavits or statements afterward.

We welcome all of you here. If you will stand, we will swear you all in.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you, God?

Mr. BROSNAHAN. I do.

Mr. PINE. I do.

Mr. MIRKIN. I do.

Mr. SMITH. I do.

Mr. PENA. I do.

Senator HATCH. Thank you.

We welcome you to the committee, and we look forward to taking your testimony. We will give each of you 3 minutes. I will have to cut it off then.

Mr. Brosnahan.

TESTIMONY OF A PANEL, INCLUDING: JAMES BROSNAHAN, BERKELEY, CA; MELVIN MERKIN, PHOENIX, AZ; CHARLES PINE, PHOENIX, AZ; SYDNEY SMITH, LA JOLLA, CA; AND MANUEL PENA, PHOENIX, AZ

Mr. BROSNAHAN. Mr. Chairman, thank you very much.

My name is Jim Brosnahan. I was born and raised in Massachusetts, graduating from Boston College in 1956; and after my wife and I graduated from the Harvard Law School in 1959, we moved to Arizona, on April 10, 1961, and between that date and February 1963, I was an assistant U.S. attorney, prosecuting criminal cases in Phoenix.

In 1963, I left Arizona and moved to San Francisco, where I also served as an assistant U.S. attorney prosecuting criminal cases. I am now in private practice in that city.

I am appearing today at the request, as I understand it, of the Democratic members of this committee. I have never volunteered any information about the events of 1962

Mr. Chairman, I am here today for one reason, having practiced in the law courts for 27 years, and that is this committee is entitled to evidence if you want it, and it should be as accurate as it can possibly be.

On election day in November 1962 in Phoenix, AZ, several assistant U.S. attorneys were assigned the task of receiving complaints alleging illegal interference with the voting process. As complaints came in, an assistant U.S. attorney, accompanied by an FBI agent would be dispatched to the precinct involved.

On that day, the U.S. attorney's office in Phoenix received numerous complaints from persons attempting to vote in precincts in south Phoenix. The most common complaint we received on that day was that the challenges at the various precincts were aggressive and were without foundation. Here, I am distinguishing between a situation where someone knows that there is no house at a certain address; that would be a legitimate challenge.

We received numerous complaints on that day as did the office of Senator Hayden, who was then senior Senator from Arizona. Based upon my understanding at that time, it was legitimate to challenge a person if they could not read. It was not legitimate to challenge a person if you had no basis to believe that your challenge was appropriate.

We were advised on numerous occasions that the lines were long. In south Phoenix at that time, the population was predominantly Hispanic and black. There were charges of harassment. It was a serious situation. Based on interviews with voters, polling officials, and my fellow assistant U.S. attorneys, it was my opinion in 1962 that the challenging effort was designed to reduce the number of black and Hispanic voters by confrontation and intimidation.

I received a complaint on election day and went with an agent of the Federal Bureau of Investigation to a polling place in south Phoenix. The polling place had a long line of voters, several tables at which sat challengers from both parties, and an official whose job it was to preside over allowing people to vote.

There may have been one or two other officials or clerks. When we arrived, the situation was tense. And I recall that situation, Mr. Chairman, because in particular, as that line stood there, when we showed our credentials and I showed that I was an assistant U.S. attorney from the Department of Justice, and the FBI agent showed that he was from the Federal Bureau of Investigation, members of the line made it clear to us by words and gestures that they were glad that we were there.

After we showed our identification, we talked to persons involved, and the FBI agent interviewed anyone having information about what had occurred at the polling place.

At that polling place, I saw William Rehnquist, who was known to me as an attorney practicing in the city of Phoenix. He was serving on that day as a challenger of voters; that is to say, the conduct and the complaints had to do with his conduct.

I have, as you can imagine and appreciate due to the passage of years since I first was asked about this a few days ago, searched my memory as to the nature of those complaints. It is my belief that if I were to try to be accurate and detailed with regard to those complaints, it might well be that I would be unfair to Justice Rehnquist, which is not my desire. That is not the reason that I am here. But I do recall that the complaints had to do with him. And on one point, I am very clear. I showed him my identification coming from the Department of Justice. On that day, we were investigating under the then existing law, which included 18 U.S.C. section 594, which made it a misdemeanor to intimidate, threaten, coerce, or attempt to intimidate, threaten or coerce any other person for the purpose of interfering with the right of such other person to vote.

In addition, we were investigating 18 U.S.C. section 241, which is a felony to conspire to deny people of their civil rights.

I have read the testimony and letters supplied by Justice-Designate William Rehnquist to this committee in 1971. On pages 71 and 72 of his testimony, he describes his role in the early 1960's as trying to arbitrate disputes at polling places. This was not what Mr. Rehnquist was doing when I saw him on election day in 1962.

At page 491 of the 1971 record, in his letter, William Rehnquist stated, "In none of these years did I personally engage in challenging the qualifications of any voters." This does not comport with my recollection of the events I witnessed in 1962, when Mr. Rehnquist did serve as a challenger.

William Rehnquist was well-known to me in 1962. As I say, the legal community at that time was a lot smaller than it is today, and Mr. Rehnquist had served as a clerk on the U.S. Supreme Court, which was a distinction, I think, that not too many lawyers in Phoenix had at that particular time.

There is no question in my mind, and I have searched my recollection having in mind the important function of this Committee. I am a lawyer, and I do understand how important this is. There is no question but that the person I talked to in 1962 was William Rehnquist.

In 1971, when Mr. Rehnquist was nominated to be a Justice of the Supreme Court, I recall the 1962 incident. No one contacted me about it at that time. I did not know until recently that this committee had actually inquired into the voting problems of those years, and I found that out only recently.

The only other point, Mr. Chairman, that might or might not be of assistance to this committee is my recollection is that these incidents were covered by the press in 1962, and I know that the evidence I have, Mr. Chairman, involves 1962 because that is the only year I was an assistant U.S. attorney in Phoenix, and it was covered by the press, and in fact there was an article in The Arizona Republic the day after which quoted Carl Michie, who is now the Federal judge—he was then the U.S. Attorney—as saying: "We were obtaining the FBI reports, and when those were received, then a decision would be made as to any criminal prosecution."

In fairness, it should be said that no criminal prosecution was pursued, and in our judgment at that time, this did not make a criminal case against any of the people about whom there had been complaints.

Thank you, Mr. Chairman.

[Statement follows:]

STATEMENT OF JAMES J. BROSNAHAN
TO THE UNITED STATES SENATE JUDICIARY COMMITTEE

August 1, 1986

My name is James J. Brosnahan. I was born and raised in Massachusetts, graduating from Boston College in 1956. After my wife and I graduated from the Harvard Law School in 1959, we moved to Phoenix, Arizona. Between April 10, 1961, and February of 1963, I served as an assistant United States attorney, prosecuting federal criminal cases in Phoenix. In 1963 I left Arizona and moved to San Francisco, California, where I also served as an assistant United States attorney prosecuting criminal cases. I am now in private practice in San Francisco.

I am appearing today at the request of the Committee. I have never volunteered any information about the events of 1962. My position is that those who are interested in those events are entitled to accurate answers from me as to what I know and specifically the members of this Committee are entitled to the testimony of any witness if they request it.

On Election Day in November 1962, in Phoenix, Arizona, several assistant U.S. attorneys were assigned the task of receiving complaints alleging illegal interference with the voting process. As complaints came in, an assistant U.S. attorney accompanied by an FBI agent would be dispatched to the precinct involved. On that day the United States Attorney's Office in Phoenix received numerous complaints from persons attempting to vote in precincts in south Phoenix. At that time the population of south Phoenix was predominantly black and Hispanic and voted overwhelmingly Democratic. The Office of United States Senator Hayden also received complaints on that day. The complaints we received alleged in various forms that the Republican challengers were aggressively challenging many voters without having a basis for the challenges. One of the complaints frequently voiced on that day was that Republican challengers would point out a black or Hispanic person in the voting line and question whether he or she could read. (At this time it was my understanding that Arizona law required that a voter be able to read English.) According to the complaints received at the U.S. Attorney's Office, these challenges were confrontational and made without a factual basis to believe the person challenged had any problems reading. The U.S. Attorney's Office was advised that because the challenges were so numerous, the line of voters in several precincts grew long and some black and Hispanic voters were discouraged from joining or staying in the voters' line. It was also reported that at one of the precincts there was a fist fight as a result of a confrontation between a Republican challenger and another person.

Based on interviews with voters, polling officials, and my fellow assistant U.S. attorneys, it was my opinion in 1962 that the challenging effort was designed to reduce the number of black and Hispanic voters by confrontation and intimidation.

I received a complaint on Election Day and went with an agent of the Federal Bureau of Investigation to a polling place in south Phoenix. The polling place had a long line of voters, several tables at which sat challengers from both parties, and an official whose job it was to preside over allowing people to vote. There may have been one or two other officials or clerks. When we arrived, the situation was tense. At that precinct I saw William Rehnquist, who was serving as the only Republican challenger. The FBI agent and I both showed our identifications to those concerned, including Mr. Rehnquist. We both talked to persons involved and the FBI agent interviewed anyone having information about what had occurred at the polling place. In fairness to Justice Rehnquist, I cannot tell the Committee in detail what specific complaints there were or how Mr. Rehnquist responded to them. The complaints did involve Mr. Rehnquist's conduct. Our arrival and the showing of our identifications had a quieting effect on the situation and after interviewing several witnesses, we left. Criminal prosecution was declined as to all participants in the incidents at various precincts that day. Prosecution was declined as a matter of prosecutorial discretion. Our investigation was pursuant to the following criminal statutes:

18 U.S.C. § 594, which made it a misdemeanor to intimidate, threaten, coerce . . . or attempt to intimidate, threaten, or coerce . . . any other person for the purpose of interfering with the right of such other person to vote.

18 U.S.C. § 241, which made it a felony for two or more persons to conspire to injure, oppress, threaten, or intimidate any citizen for exercising his civil rights.

I have read the testimony and letter supplied by Justice Designate William Rehnquist to this Committee in 1971. On pages 71 and 72 of his testimony, he describes his role in the early 1960's as trying to arbitrate disputes at polling places. That is not what Mr. Rehnquist was doing when I saw him on Election Day in 1962. At page 491 of the 1971 Record in his letter, William Rehnquist stated: "In none of these years did I personally engage in challenging the qualifications of any voters." This does not comport with my recollection of the events I witnessed in 1962 when Mr. Rehnquist did serve as a challenger.

William Rehnquist was well-known to me in 1962. The Phoenix legal community was a lot smaller than it is now. Mr. Rehnquist had clerked on the United States Supreme Court, which was a distinction that few Phoenix lawyers had at that time. There is no question that the person to whom I spoke at the polling place was William Rehnquist.

In 1971 when Mr. Rehnquist was nominated to be a Justice of the Supreme Court, I recalled the 1962 incident. No one contacted me about it. I did not know until recently that this Committee had actually inquired into the voting problems of those years.

Senator HATCH. Thank you, Mr. Brosnahan.

As you know, I have let you go longer than usual.

Mr. BROSNAHAN. I appreciate that.

Senator HATCH. I wanted you to state the matter as you saw it. According to Martindale-Hubbard, you graduated from law school in 1959?

Mr. BROSNAHAN. Yes, sir.

Senator HATCH. The first job you list was in 1961 when you were appointed assistant U.S. attorney in Arizona. Is that correct?

Mr. BROSNAHAN. Well, I had other jobs before that. I will be glad to give them to you if you want me to.

Senator HATCH. What did you do before that?

Mr. BROSNAHAN. I went to work for the firm of Langerman and Begam—first, I clerked for Judge Stevens in the Superior Court in Phoenix for about 5½ months. I then went to the law firm of Langerman and Begam, which was a plaintiffs' personal injury firm, and I was there, except when I served in the Air Force, protecting the State of Texas only, for about 6 months—except for that, I was with them for about a year and a half.

Senator HATCH. So you practiced law, then, approximately 2 years before becoming assistant U.S. attorney.

Mr. BROSNAHAN. That is true.

Senator HATCH. About 2 years. According to one of your interviews with the press, I believe it was with the Washington Post on July 25 of this year, you stated that you, with an FBI agent, investigated the so-called GOP challenges at the Bethune Precinct in 1962.

Mr. BROSNAHAN. The name of the precinct is not that clear to me. The stories talk about Bethune. But I understand what you are saying.

Senator HATCH. It was at the Bethune School.

Mr. BROSNAHAN. That is what you are saying. What I am saying is that it was at a polling place.

Senator HATCH. So you do not really know where it was, then.

Mr. BROSNAHAN. I cannot and I left—and you will understand, I left Arizona in 1963, and these are not my neighborhood areas. But it could have been Bethune, but I am not sure about that.

Senator HATCH. As we all know, Mr. Rehnquist first appeared before this committee as a nominee for the Supreme Court of the United States in 1971. Now, the Post account says that you were not a witness in 1971 against the Justice?

Mr. BROSNAHAN. No, no.

Senator HATCH. Is there any reason why you did not speak up at that particular time?

Mr. BROSNAHAN. No, there is not. I had observed that Bill Rehnquist, as he was then called, had gone to work for the Department of Justice in approximately 1969 after President Nixon was elected. And I remember thinking at the time about this incident, and I remember thinking, well, the times they are a-changing, and Mr. Rehnquist is in the Department. When he was nominated, I of course knew that. And I did again think about this incident. But nobody contacted me. I was in a different city, and I did not come forward or volunteer at that time.

Senator HATCH. I understand. In the July 25, 1986, Washington Post interview, you are quoted as saying: " 'My best recollection is that he"—meaning Rehnquist—"was challenging voters, Brosnahan said. 'But that was 1962, and this is 1986. I know he has denied that, but I have asked myself in fairness what I can remember." ' Is that a fairly accurate quote?

Mr. BROSNAHAN. It is. And I hope the committee—and you have to decide these matters, and they are not easy matters. Friday is not the day, Mr. Chairman, you understand, that I usually testify against a Justice of the Supreme Court. And so I hope you have some feeling that I did not come here on a "wing and a prayer." I have tried to—and I think I have done it—be as accurate and as fair to Justice Rehnquist as I could possibly be. At least I have made that effort.

Senator HATCH. I notice that in the Los Angeles Times on July 29, 1986, you were quoted as saying: "I saw Rehnquist there among a group that were challenging voters, but I cannot recall any specific actions I saw Rehnquist taking personally."

Is that an accurate statement?

Mr. BROSNAHAN. That is an accurate statement, and I think that is what I said a moment ago, Mr. Chairman, that I know he was a challenger. But one thing I would like to explain to you—and I am sure you can appreciate it—when we arrived and announced that I was an assistant U.S. attorney, and I was accompanied by the FBI, that had a very calming effect on the situation. You can imagine what it was like. It slowed it down.

While we were there, not too much happened. I think some voters went ahead. But for example, there was no challenging going on while we were there to conduct our investigation.

Senator HATCH. The important thing is that you could not recall any specific action that you saw him take in person. In other words, you did not see him do anything personally.

Mr. BROSNAHAN. Only to this extent, and this I am sure about, that there were complaints about his conduct. And that is as far as I can go.

Senator HATCH. Do you remember specifically his conduct, or somebody else's conduct?

Mr. BROSNAHAN. His conduct. There were other complaints on that day about other people's conduct, but there were complaints about his conduct.

Senator HATCH. The important thing is you did not personally observe anything that they were complaining about?

Senator BIDEN. You think that is the important thing.

Senator HATCH. Yes; I think it is important.

Let me restate the question so we understand it.

Mr. BROSNAHAN. Surely, surely.

Senator HATCH. You said you saw him doing nothing personally.

Mr. BROSNAHAN. When I arrived——

Senator HATCH. You say there were those who accused him, but your personally saw him do nothing offensive. Is that correct?

Mr. BROSNAHAN. The only thing, Mr. Chairman, that I saw him do was he was acting as a challenger in this precinct. When we arrived, as I say, it stopped. And we received complaints, as you say, which is not what I would observe, but received complaints. And I might say also to you that the FBI agent was dispatched, as I recall it, to check out some other voters who had left.

But no, I did not see him, for example, go down the line and challenge a black voter or an Hispanic voter on the grounds they could not read. I did not see that.

Senator **Hatch**. How did you know he was a challenger? Did he walk up and say, "Hi, Mr. Brosnahan. I am a challenger"?

Senator **Mathias**. Well, is "challenger" an adjective or is it a title? Under the Arizona law, is there an official role for challengers, people who are certified as challengers by the parties?

Mr. **Brosnahan**. I can tell you my understanding, Senator, which was that a challenger is allowed for in some form under the law, or was at that time, and the challenger is designated by the party—in this case, it happened to be the Republican Party—and he would be a challenger. Then his job or her job, as the case may be, as somebody comes along about which there is a legitimate question, some basis to believe they should not vote, they can interpose that challenge, and then the officials who are there think that through and decide what they are going to do

Senator **Mathias**. Must one have a written certification to be a challenger?

Mr. **Brosnahan**. I do not know that.

Senator **Hatch**. Don't they have to have credentials to be a challenger at that time?

Mr. **Pine**. They do; yes.

Mr. **Brosnahan**. I do not know that. Some of the other witnesses may be able to tell you that

Senator **Hatch**. All right. The important thing is that they had to have credentials. You indicated that your name is——

Mr. **Pine**. Charles Pine.

Senator **Hatch**. You are Mr. Pine.

They had to have credentials. Did you check Mr. Rehnquist's credentials at the time?

Mr. **Brosnahan**. I do not recall whether I did. But I do recall, Senator, there was not any question he was a challenger. I mean, he did not—if I may tell you what I think I saw——

Senator **Hatch**. How did you know he was a challenger if you did not look at his credentials?

Mr. **Brosnahan**. Two bases for this. People told me he was challenging, and he did not deny he was a challenger. At that time in 1962, he did not raise any question about credentials or any of that. He did not deny that.

Senator **Hatch**. But you did not ask him as an officer of the law and neither did the FBI. Is that right?

Mr. **Brosnahan**. We might have, but I have no recollection of it.

Senator **Metzenbaum**. As a matter of fact didn't you say in a statement recently: "Rehnquist stated to Brosnahan that Rehnquist was a challenger"?

Mr. **Brosnahan**. I am sure that he did. I am sure that he did. In other words, my recollection is, contrary to perhaps where we are now, on that day there was not any question but that he was challenging voters. And I might say to you I——

Senator **Hatch**. Wait a minute.

Mr. **Brosnahan**. Yes?

Senator HATCH. You cannot say there was not any question there because you do not recall seeing him challenge voters. The point is that he admits he was there. He admits he was a poll-watcher at the time.

Mr. BROSNAHAN. No; a poll-watcher is something completely different. He was not watching polls when I saw him.

Senator HATCH. He admits that he was a legal adviser who was supposed to be there to settle disputes. Let me go back to the Los Angeles Times article. In that, you said: "I saw Rehnquist there among a group who were challenging voters, but I cannot recall any specific action I saw Rehnquist taking personally, Brosnahan, now a San Francisco attorney said."

You also said, "We saw nothing illegal taking place." Is that a correct quote?

Mr. BROSNAHAN. If you are asking—yes, in fairness—and I am prepared to answer your question—if you asked me did I see, for example, a challenge, the answer really, based on my recollection, is no, I did not.

Senator HATCH. Is this a correct quote in the Los Angeles Times: "We saw nothing illegal taking place"?

Mr. BROSNAHAN. Well, no.

Senator HATCH. That is not a correct quote?

Mr. BROSNAHAN. When you use the word "see," Senator—and I do not want to get down to this—but what we did see were complaints from people; what we received were complaints, and that was our job, to gather that evidence. So that to the extent that that quote implies that we did not find anything wrong there, that would not be correct.

Senator HATCH. Let me be fair to you on this. Let me read the whole paragraph, because I think the front sentence might help you a little bit.

> I saw Rehnquist there among a group who were challenging voters, but I cannot recall any specific action I saw Rehnquist taking personally, Brosnahan, now a San Francisco attorney, said.

Then it reads:

> The group as a whole, however, were very aggressively insisting that black and Hispanic voters read a small card with part of the Constitution printed on it. We saw nothing illegal taking place.

Is that basically a correct quote?

Mr. BROSNAHAN. I think the last part is sort of added on in a way that I would not say it.

Senator HATCH. You do not recall saying that at all?

Mr. BROSNAHAN. I do not recall saying it in that order; that is the only thing.

Senator HATCH. Did you or did you not say, "We do not recall seeing anything illegal taking place"?

Mr. BROSNAHAN. No; and Senator, let me tell you that when we went there, what happened was the evidence was gathered, and we then returned to the office to determine the question of whether anything illegal had occurred, and as I say, Mr. Michie announced in public that he was going to consider that to determine what action should be taken.

Senator HATCH. Was an FBI report made by the agent who was with you of this matter?

Mr. BROSNAHAN. I would assume that reports were made with regard to all of the activity in all of the precincts. And I should mention to you, because it has not come up, there was not just one precinct or one challenger on that day. There were many, numerous—whatever fair word you can use—there were a lot of challengers. For example, the Republican chairman for the State announced that there were 300 Republican challengers in both Maricopa and Pima County. So there were a lot of challengers there, and from some of those precincts, Mr. Chairman, came very strong complaints. The FBI gathered information with regard to some of those situations and put that together.

Senator HATCH. All right. According to an account that we have, the statement was that, "Brosnahan said that Rehnquist was definitely in the position of a challenger, but Brosnahan had 'no accurate recollection of Rehnquist actually challenging'." Is that correct?

Mr. BROSNAHAN. His—I did not witness——

Senator HATCH. You did not see him challenge

Mr. BROSNAHAN. As far as I can recall, Senator, while I was there he did not challenge a voter. But the reason for that was that when we arrived, it got very quiet. I mean, it was a serious situation. And sometimes—I know the committee is trying to sift all this out—but you kind of lose the feeling of the moment. And the feeling of the moment at that polling place was, and the reason I remember it was, that the line of people was concerned, troubled, upset. And when we showed our identification, then it all calmed down, and as I say, it became a quieter situation.

Senator HATCH. In the Washington Post article of July 25, 1986, it basically describes you as a former prosecutor, now senior partner in a San Francisco law firm. Then it quotes you as saying: "My best recollection is that he," meaning Rehnquist, "was challenging voters, but that was 1962, and this is 1986. I know he has denied that, but I have asked myself in fairness what I can remember."

Concerning these interviews, did the reporters contact you, or did you contact them?

Mr. BROSNAHAN. The first call I received—no, I have not contacted any reporters; this is not a situation that I particularly sought out——

Senator HATCH. That is all I wanted to know.

Mr. BROSNAHAN. Yes; so that you understand that. I received a call from someone working for the Nation Institute, and I think the call was about 10 days ago. And it was a person who knew that I had been a prosecutor in Arizona and asked me what I remembered and I told her, and she asked me at that time whether I would be willing to testify before this committee if I was asked to do so. And I thought about it for a second, trying to determine what I should do, and I said, "Yes, if I am asked to do it, I will testify." That is how I was contacted.

Then, when this committee began its function, as I am sure you all know, every day the world shakes, you know, when you move a paper, and pretty soon, there were reporters in our office, and I did talk with them, and I was as accurate as I could be.

Senator **Hatch**. Did you contact the FBI or Justice Department back in 1971 on this occasion, or is the account accurate where you said, "We just did not bother"?

Mr. **Brosnahan**. No; I never said I did not bother. What I said was no one contacted me from this committee, and I did not know—I think it might have been different, but I am second-guessing myself—if I had known that this committee in 1971 was passing on Justice Rehnquist, and you were trying to decide whether it was a bad situation in south Phoenix and whether he had a part in it, I like to think I probably would have called somebody up and told them what I knew. But I do not know—I did not know at the time.

Senator **Hatch**. Now——

Senator **Kennedy**. Neither did the committee until after the end of the hearing.

Mr. **Brosnahan**. I understand that, Senator.

Senator **Hatch**. In your interview with the Nation Institute, you were quoted as saying:

> James J. Brosnahan was assistant U.S. attorney in Phoenix in 1962 and is currently a partner at Morrison & Forrester in San Francisco. Brosnahan was called to the Bethune polling place in November 1962 to investigate allegations that Republican poll challengers were obstructing minority voters.
>
> We received complaints, Brosnahan said in a July 15, 1986 telephone interview from his San Francisco office, about young Republican workers, poll workers, challenging Hispanic voters. By doing so, they had built up long lines at the polling booths. Rehnquist was at one of them. He was one of the people challenging.
>
> They would challenge voters that they did not think could speak English, people who had any Spanish accent.

I am having a little bit of trouble here because you give interviews saying that you really did not observe him doing anything. You observed that he was a challenger, but you did not see him do anything.

Mr. **Brosnahan**. No, no. That is almost exactly, I think, what I just said, Senator. I think it is. I would leave it to the committee as to whether it is or not. But to me, it is.

Senator **Hatch**. Let me go on and read. I am not trying to give you a rough time. I am just trying to ascertain what your statements are. Let me go on and read it.

Mr. **Brosnahan**. I understand.

Senator **Hatch** [reading].

> Brosnahan, accompanied by an FBI agent to the precinct, said he did not find sufficient evidence for prosecution on civil rights violations. Vigorous challenging short of harassment was legal in Arizona in 1962. What is important here is not any new evidence of voter harassment beyond what was brought out in Rehnquist's 1971 confirmation hearings.
>
> Rather, what is important is Brosnahan's eyewitness account that Rehnquist himself engaged in voter challenges, a direct contradiction of Rehnquist's letter to the Judiciary Committee.
>
> Brosnahan stated that, "In 1962, there was a group of Republicans that were challenging black and Hispanic voters in ways designed to slow down the voting process and reduce the number of Democratic voters in these precincts. The only thing I can say about William Rehnquist is that he was part of that effort. I cannot say exactly what he did.

Is that a fair comment?

Mr. **Brosnahan** That he was one of the challengers. But what he did with regard to being a challenger, that is the point at which my recollection reaches, as far as I am concerned, something that I would not care to say. I could make an approximation of it, but I do not think that would be——

Senator HATCH. Is that correct, or isn't it?

Mr. BROSNAHAN. It is correct that I know that he was——

Senator HATCH [continuing]. I cannot say exactly what he did.

Mr. BROSNAHAN. Excuse me. I am sorry.

Senator HATCH. Is the statement correct where you are quoted as saying: "I cannot say exactly what he did"?

Mr. BROSNAHAN. That he was a challenger, yes, but that what he did as a challenger, I cannot say. I could make an approximation of it but I could not give you the details.

Senator HATCH. All right.

Senator BIDEN. At some point, I am going to ask you to make an approximation. [Laughter.]

Senator METZENBAUM. Mr. Chairman, I think we ought not to lose sight. The issue has to do with whether or not the Chief Justice has represented, in 1971, when he said he was not a challenger. And the issue has to do with his answers to this Senator 2 days ago, when he indicated he had nothing to do with these activities.

So let us not confuse what the issue is if you are trying to make a little detail of what he did and how he did it——

Senator SIMON. Point of inquiry, Mr. Chairman.

Senator HATCH. I want to get these accounts so that they mean something.

Senator SIMON. Mr. Chairman, point of inquiry.

Just what is our process here? The Chair has now used about 15 or 20 minutes——

Senator METZENBAUM. About 40 minutes.

Senator DECONCINI. About 40 minutes.

Senator BIDEN. I think we will just extend the time, won't we, Mr. Chairman?

Senator HATCH. Yes. [Laughter.]

Mr. Brosnahan, how many minutes were you there?

Mr. BROSNAHAN. How many total minutes was I at the polling place? About 15 or 20, something like that.

Senator HATCH. Fifteen or 20 minutes.

You did state in the National Public Radio broadcast back on July 25 of this year: "The only thing that I know about William Rehnquist was that in November 1962, he was one of the challengers," which is consistent with what you have said here——

Mr. BROSNAHAN. That is true.

Senator HATCH [continuing]. Except you say, "the only thing I know * * *."

Then you say, "Well, my best recollection is that Mr. Rehnquist, as he was then known, was serving as a challenger in that precinct."

Then you say, "The thing that I remember that I am sure about is that Bill Rehnquist was at the precinct. My best recollection is that he was serving as a challenger of voters. And the third thing that I should say in absolute fairness is that I did not see him do anything, and I cannot testify or say what it is that he was doing as a challenger."

Mr. BROSNAHAN. Well, that is right.

Senator HATCH. What is it?

Mr. BROSNAHAN. Senator, Senator, it is exactly what I said—I think in fairness also to me—just a lawyer—but to me, three times this morning, while I was there, he did not aggressively challenge anybody. But I do not find that surprising. And so that is why—I mean, you can understand the situation with the two of us standing there, representing what we represented. He did not challenge while we were there, or go down the line and say, "Can you read?" or anything like that. He did not do that while I was there.

Senator HATCH. All right.

Mr. BROSNAHAN. So that is a true statement.

Senator HATCH. You arrived in the company of the FBI in 1962. Why, then, does the FBI, report not even mention Rehnquist as being present?

Mr. METZENBAUM. Well, Mr. Chairman, just a moment. I object. Mr. Chairman, you just gave the statement about not using the FBI report, and then you just said the FBI report says something. I just want you to know you have let down the bars.

Senator HATCH. No, I have not. Here is a man who was assistant U.S. attorney, who was with an FBI agent, who undoubtedly read the report, and frankly, in 1962——

Mr. BROSNAHAN. "The report," Senator? Are you talking about one report?

Senator HATCH. I am talking about any report made on this by the FBI. There is nothing in the record——

Mr. BROSNAHAN. I can tell you first of all, I have never seen—whatever I saw in 1962, I have never been shown by any member of this committee or staff or anybody any FBI reports. So I do not know what you are referring to. But you may have one of the reports.

I am sure that there were a number at that time.

Senator METZENBAUM. He is referring to the FBI report when they talked with you, Mr. Brosnahan.

Mr. BROSNAHAN. Yes, Senator.

Senator HATCH. Let me go further. Are you aware that there was a Republican challenger involved in a scuffle at the Bethune precinct in 1962?

Mr. BROSNAHAN Yes.

Senator HATCH. Contemporaneous FBI and newspaper reports identified this challenger as Wayne Benson.

Mr. BROSNAHAN. Yes.

Senator HATCH. Are you aware of that now?

Mr. BROSNAHAN. Yes. I knew that then.

Senator HATCH. As I understand it, Mr. Michie, your supervisor at the time, the FBI report in 1962, and the Arizona Republic, say that Benson was the challenger who was causing the problem.

Mr. BROSNAHAN. To the extent that the question assumes that there was one problem and one precinct in November 1961, that is not what happened. There were numerous problems. There were numerous complaints that we all received in the office——

Senator HATCH. From that precinct?

Mr. BROSNAHAN. From that one and others. That one became famous, because in that one, somebody got mad, and somebody—there was a fist-fight—and somebody did not care for being challenged in the way they were being challenged. But what I am saying to you, Senator, is that there were complaints from a number of precincts in south Phoenix on that day, and that we investigated some number of them. I cannot tell you how many precincts there were investigated, but there were a number.

Senator BIDEN. Mr. Chairman, point of clarification in fairness to the witness. Obviously, the chairman is under the impression that the precinct in which the scuffle took place was the same precinct, at that the same time, that in fact, you confronted, spoke to, Justice Rehnquist. Is that true?

Mr. BROSNAHAN. I do not know that, no.

Senator HATCH. Let me reserve some time and come back.

Let us turn to you Senator Biden.

Senator BIDEN. I thank the Chair, and I thank you, Mr. Brosnahan, for coming.

Let me try to make sure I understand here, Mr. Brosnahan. Do you practice law now.

Mr. BROSNAHAN. Yes, sir.

Senator BIDEN. Are you a partner in the law firm with which you practice?

Mr. BROSNAHAN. Yes, sir.

Senator BIDEN. In what status as partner? Are you a junior partner, a senior partner?

Mr. BROSNAHAN. I am a senior partner.

Senator BIDEN. You are a senior partner. And is it a small law firm, large—how many members in your law firm.

Mr. BROSNAHAN. 230.

Senator BIDEN. 230?

Mr. BROSNAHAN. Yes, sir.

Senator BIDEN. I guess compared to a corporation, that may be small. [Laughter.].

Has your law firm, since you have been a partner in that firm—what is the name of that firm?

Mr. BROSNAHAN. The name of the firm is Morrison & Forrester.

Senator BIDEN. Has that law firm ever taken cases to and argued them before the Supreme Court of the United States of America?

Mr. BROSNAHAN. Yes.

Senator BIDEN. Do you expect that may happen again?

Mr. BROSNAHAN. I know that it is going to happen again. It is going to happen in September.

Senator BIDEN. It is going to happen in September. Good luck. [Laughter.]

Let me——

Mr. BROSNAHAN. Senator, you asked me what my status was in my firm. That depends on when I return. I do not know.

Senator BIDEN. Let me ask you this. There seemed to be several salient points, and in his usual thorough way, the chairman has attempted to bring out the truth here. Is the truth that you are absolutely certain that at some point during election day 1962, that William Rehnquist was in a polling place in the position of a challenger?

Mr. BROSNAHAN. Yes.

Senator BIDEN. The second question: Is it true that you had received complaints from that polling place that there was challenging and harassing taking place in that polling place?

Mr. BROSNAHAN. Yes.

Senator BIDEN. Is it true that at the moment you arrived, you arrived not undercover, but you arrived in effect by identifying yourself, announcing who you represented, that is, the Federal Government?

Mr. BROSNAHAN. That is true. That is the first thing we did.

Senator BIDEN. Now, did you at any time during that election day appear at any other precinct polling place?

Mr. BROSNAHAN. I think I did.

Senator BIDEN. Was it the habit—have you ever, once having identified yourself as being a representative of the Federal Government in the U.S. Attorney's Office, was there ever an occasion after having been identified that someone asked a voter or a person waiting in line whether or not they could read a card, read English?

Mr. BROSNAHAN. No, and for the reason that I have given, our arrival would have a very quieting effect on the proceedings.

Senator BIDEN. Well, you and I and the chairman know that, but it is important that the record reflect it precisely.

Mr. BROSNAHAN. I understand.

Senator BIDEN. Now back to the precinct—well, one other question. Is it your testimony that you are not certain as to the name of the precinct in which you encountered William Rehnquist?

Mr. BROSNAHAN. That is true.

Senator BIDEN. Is it your testimony that once having encountered William Rehnquist, you were able to at that time and now identify the person who was challenging as William Rehnquist?

Mr. BROSNAHAN. Yes, and I do not have any question about it, because I knew who he was. I even want to say I was surprised, actually, to find him there. But I knew who he was. He was a lawyer in town, and he had a distinction, he was known, as you have been hearing from the witnesses, as a very bright lawyer, and I knew him, and I knew who he was.

Senator BIDEN. So there is absolutely no doubt in your mind that on election day, William Rehnquist was present in a polling place in the role of challenger?

Mr. BROSNAHAN. There is no doubt in my mind, Senator, and I have recalled it in that form since that time. In other words, it has been one thing in my mind that I have remembered, and I think particularly because he went on to serve with the Department and then served in the Supreme Court.

Senator BIDEN. Now let us go to the second issue—in my mind; it may not be in anyone else's. Having established in your mind and testifying under oath that William Rehnquist was a challenger in a Phoenix polling place on election day, that same polling place at the same time he was challenger, having complained or received complaints from it, to your office and the FBI that there were tactics that were being employed that at least upset people, without characterizing them as harassment or anything—people were upset——

Mr. BROSNAHAN. That is correct.

Senator BIDEN [continuing]. Asking you, a U.S. attorney, to come to that polling place to "straighten things out."

Mr. BROSNAHAN. That is true. And as I recall it, we did not necessarily go to every precinct where there were complaints. We went to some of them on a basis that the level of complaint was such that it made sense to use our resources in that way.

Senator BIDEN. Now, to the best of your knowledge, did you identify at that time, the time you encountered Mr. Rehnquist, did you identify anyone else as being a challenger?

Mr. BROSNAHAN. Not at that precinct, and not at that time.

Senator BIDEN. So to the best of your knowledge, the only challenger at that precinct at that time was William Rehnquist—the only Republican challenger.

Mr. BROSNAHAN. That is correct.

Senator BIDEN. Now, did you at the time, from the moment you walked indoors—I assume it was indoors——

Mr. BROSNAHAN. My recollection is that it was in an open area. I am pretty sure it was a school. And there was an open area with tables and sort of—it might have been under a roof, but it might have been an open area of some kind. That is my best recollection.

Senator BIDEN. Well, at the time you walked into the area designated as the polling place, from the moment you walked into that designated area until the time you left, did any person in that polling place, whether an election official, a Democratic challenger and/or someone who had just voted or someone who was waiting in line to vote, did anyone in that polling area say to you at that time: "There is in fact challenging going on that should not go on"?

Mr. BROSNAHAN. Yes; in some form, they said that.

Senator BIDEN. Now, could they have reasonably been talking about anyone else other than the man who you have established to the best of your recollection under oath was the only Republican challenger in the place?

Mr. BROSNAHAN. No; and the reason that I remember that is, I must say, that from that day on, I thought about William Rehnquist in a different way. And as has been expressed by this committee, I knew a lot of Republicans, and we had our differences. I am a Democrat, in fairness to the chairman. I am a Democrat.

Senator HATCH. We knew that, Mr. Brosnahan.

Mr. BROSNAHAN. I know you do. [Laughter.]

Senator HATCH. I have received that impression.

Mr. BROSNAHAN. It is true. But I must tell you, I suppose, in aid of my efforts to recollect, that from that day forward, I felt a little differently about Mr. Rehnquist, and it is for the reason of your question, Senator.

Senator BIDEN. Let me recap this so I understand it, because it is very important to me. You as U.S. attorney in 1962 on election day in Arizona were either directed and/or made a judgment based upon complaints from a polling place. You arrived at said polling place. There was tenseness. You were told to the best of your recollection by people in line or within the polling area that unfair things were going on——

Mr. BROSNAHAN. In some form they said that.

Senator BIDEN [continuing]. In some form they said that—and that you made your way to identify the only person at that moment you could identify, and that is the Republican challenger.

You knew of no other challenger on the Republican side at that time. That Republican challenger was one said William Rehnquist.

Mr. BROSNAHAN. That is true.

Senator BIDEN. Who you have identified that you knew before——

Mr. BROSNAHAN. Yes.

Senator BIDEN [continuing]. And that once having arrived, things settled down.

What happened to the best of your knowledge, if you have any knowledge, after—or, let me back up. What do you recall having said to this challenger you have identified as William Rehnquist?

Mr. BROSNAHAN. We said to him in some form, "What is going on here?" In other words, "We have received certain complaints at the office. That is why we have arrived, to determine what is going on." We received—and I do not have the order—but, we received complaints by people in the line and were told by someone that others had left, either because they were discouraged, or whatever.

We talked with him about what was going on there, what was the basis for his challenges. This is the area that it is hard to do, but I think there was a dispute, and I think the dispute would be in the general area of whether there was a basis for the challenge or not. And that is about as clear as I can be on it.

Senator BIDEN. Now describe for me what you recall having seen upon arriving at the polling place. What is your recollection?

Mr. BROSNAHAN. The first thing we saw was a long line of voters. We saw the polling place; some tables; some people there, officials of one kind or another. And we walked in—the two of us went immediately—I am sure of this—to the table to identify ourselves, to say who we were. And I guess we saw a line, we saw some people sitting behind tables and functioning one way or the other, and that is what we saw when we first arrived.

Senator BIDEN. Would you—and I only have a few more questions, Mr. Chairman, and I appreciate it because I, as you, believe that this is a pivotal witness—can you describe for me, if you know, what happened in that precinct after you left?

It seems like a strange question, but did you have complaints, to the best of your knowledge, after you departed from that precinct?

Mr. BROSNAHAN. No; I have no recollection of any subsequent complaint that day from that particular precinct, and I have no recollection of anything else that day with regard to Mr. Rehnquist.

Senator BIDEN. Do you understand the significance of your testimony, that is, that——

Mr. BROSNAHAN. Fully, fully.

Senator BIDEN [continuing]. Here, we have a man who, notwithstanding what may happen here, still may end up being the Chief Justice of the Supreme Court of the United States of America; having—and I will go back and read in detail Justice Rehnquist's statements at the first hearing and his statements made before this committee, with precision—but here we have a man of your stature, you are not someone who has just walked off the street. You are a senior partner in a powerful law firm. You have a reputation that is well-known and well-respected in a significant city in a major State. And you are coming before this committee under oath, testifying that you saw William Rehnquist in a polling place where you had received complaints, and that in fact, he was fulfilling the role of a challenger in that polling place.

Mr. **Brosnahan**. That is correct.

Senator **Biden**. I have no further questions.

Senator **Hatch**. The fact is, Mr. Brosnahan, that you did not volunteer to testify back in 1971, which is much closer to the event, even though you had a changed opinion of Mr. Bill Rehnquist.

Senator **Biden**. In fairness, I believe the witness has testified that in fact he was unaware of the importance of it at the moment, at the time, and further, Senator Kennedy stated that in fact it was not before the committee in that form at that time.

Senator **Hatch**. So the 15 years have made you aware of the importance of this testimony.

Mr. **Brosnahan**. No, no, Senator, I do not agree with that.

Senator **Metzenbaum**. Mr. Chairman, I think that each of us has an opportunity to inquire. I do not believe that the Chairman has any special prerogative to add some editorial comment after each of the Senator's concludes his inquiry.

Senator **Hatch**. Wait a minute. As I understand it, we go back and forth. We are not going to let five or six Democrats go to work here.

Senator **Metzenbaum**. Well, you went for 40 minutes, and we did not interrupt you.

Senator **DeConcini**. Well, wait a minute, Mr. Chairman——

Senator **Kennedy**. Don't we usually get a first round before someone gets a second round?

Senator **Hatch**. I had the understanding that I would have enough time to ask basic questions. Gave him triple the time that he was supposed to have.

Senator **Kennedy**. Don't we usually go a first round?

Senator **Hatch**. Let us just be fair about it.

This is an important matter.

Senator **Metzenbaum**. Mr. Chairman, I want to just say that I think it has been the precedent here as long as I have been here—and I realize, only a short 10 years—that we always get a first round before we start a second round.

Senator **Kennedy**. That is right.

Senator **Hatch**. We do not go back and forth?

Senator **DeConcini**. Certainly, if there is somebody there, they get their first round.

Senator **Kennedy**. If they are interested enough.

Senator **Hatch**. Let me do that. I will wait until the end of the round. We will go to Senator Kennedy.

Senator **DeConcini**. I thank the Chair.

Senator **Kennedy**. Thank you.

Mr. Brosnahan, I want to also join in thanking you and the other members of the panel.

One of the questions I asked Mr. Rehnquist when I inquired of him about this whole program is whether he knew any one of you or the others that had been inquired of by the FBI. And I think, Mr. Brosnahan, he did mention that he had met you; but he did not know any of the others, and he did not know why you would take the time out of your lives to travel across the country, to come here to testify. I asked him about what is the possible motivation for any of you to do it, and he could not give a good reason. And I think the fact is that the witnesses that we have here today who have such compelling and impressive testimony as we have just heard from this witness speak very loud and clear as to what the activities of Mr. Rehnquist were at that particular time. And I think the record has been made clear.

Unfortunately, I was a member of the Judiciary Committee when we gave consideration to Mr. Rehnquist in the past, it was only after the conclusion of the hearings that this information became available to the committee, and we were denied the opportunity at that time to reopen the hearings, denied that opportunity to have the FBI to go on out and do the kind of thorough investigation that quite frankly should have been done. And the committee, I think, failed in its responsibility to be able to provide that kind of information to the U.S. Senate.

But nonetheless, Mr. Brosnahan, I will mention first of all Mr. Rehnquist's own comments that he had with regard to his activities. This was in relationship to Dr. Smith. But he later, in his response to my question, described his activities. It is in the record on page 108:

> Mr. REHNQUIST. "I am sure he is mistaken." Now, he is talking about Dr. Smith. "It is perfectly possible that I could have arrived at a southwest Phoenix polling place." Now, Smith is talking about either 1960 or 1962, in a southwest Phoenix polling place.
>
> REHNQUIST. "It is perfectly possible that I could have arrived at a southwest Phoenix polling place with a couple of other people, and again, I gather he is not definite as to the years because one of my jobs as notice reading what I said in 1971, and recalling as best I can now, was to go to polling places where our challenger was not allowed into the polling place or if a dispute came up as to something similar to that, either I or along with my Democratic counterpart would go.
>
> "So it is not at all inconceivable that I would have been with a group of two or three other people going to a southwest Phoenix polling place in whatever year that was."

The clear impression that Mr. Rehnquist is trying to give—not his impression; that is his testimony—that that was his kind of function. He was whatever you call a "notice reader." I do not know whether there is such a function.

Mr. BROSNAHAN. I do not know.

Senator KENNEDY. But one would gather from that kind of statement and that kind of commentary, a completely different kind of function than what you have described here today. Now, which is more accurate? Does this direct testimony of Mr. Rehnquist refresh your recollection? Does that more clearly describe what he was doing in a polling place, either in 1960 or 1962 in the southwest part of Phoenix?

Mr. BROSNAHAN. You see, that kind of function, Senator, I think we would have welcomed, that is to say, the arrival of someone—and I can only testify to what I saw on that day in the precinct I was present at—but we would have welcomed the assistance of anyone who would have come to try to bring order out of it.

At no time, as far as what I saw and where I was, did we have the benefit of any assistance like that. And what I have said this morning, of course, is that he was acting as a challenger and not in the capacity as you describe it, based upon the events that I saw.

Senator KENNEDY. In our inquiries after this whole question came up in 1971, we had an opportunity to inquire—and this was Senator Hart, Senator Biden, and myself—we did not have all of the information at that time available at the close of the hearings, but one of the questions that we asked was, "Did you personally engage in challenging the qualifications of any voters?"

"Did you personally engage in challenging the qualifications of any voter, and if so, please describe the nature and the extent of challenging you did and the basis from which the challenges were made."

And his response was, as has been indicated, that he had—I will just read the exact response—"In none of those years did I personally engage in challenging the qualification of any voter." That was the written response.

And I read to him the statement that you had made, and which you reviewed here for the committee. The latter part of the statement I said—this is you—"He said"—which is Brosnahan said—"You went to a precinct with an FBI agent, and you were sitting there at a table where the voter challenger sits, and a number of people complained to Brosnahan that you had been challenging voters."

"Rehnquist. 'No.' " He said, "No, I do not think that is correct."

Well, is it correct or isn't it correct? What is your sworn testimony?

Mr. BROSNAHAN. My testimony is that he was acting as a challenger at that particular time when I saw him in 1962.

May I add one thing, Senator?

Senator KENNEDY. Certainly.

Mr. BROSNAHAN. I think it is clear, but had it been anything else, I do not know that I would ever remember it or think about it or think about now Justice Rehnquist in the way that I have over the years, and I think in my mind that supports my recollection of what occurred.

Senator KENNEDY. Do you remember any other similar circumstances, other people that come to mind; did you run into this kind of——

Mr. BROSNAHAN. On that day, do you mean?

Senator KENNEDY. Yes.

Mr. BROSNAHAN. There were other incidents.

Senator KENNEDY. Fine, OK. If someone else wants to follow that up, that is fine, but let me just come back to this.

Mr. BROSNAHAN. OK.

Senator KENNEDY. Are you certain that the complaints you heard when you arrived at the polling place involved Mr. Rehnquist's conduct?

Mr. BROSNAHAN. Yes.

Senator KENNEDY. And what do you think were the goals of the voter challenges on that day in that precinct?

Mr. BROSNAHAN. I am now talking about the program as a whole, and I am basing my response on the complaints we received, the number of them, and the intensity of them, on the interviews that were made by the FBI, and upon conversations I had with persons on that day

The thrust of the effort was to confront voters, to challenge them, in hope that they would be intimidated, that they would not stand in line, that they would be fearful that maybe they would be embarrassed.

Senator **Kennedy**. Intimidated from doing what?

Mr. **Brosnahan**. From voting.

Senator **Kennedy**. And you are certain that Mr. Rehnquist participated.

Mr. **Brosnahan**. He participated as a challenger in one of the precincts.

Senator **Kennedy**. No further questions.

Senator **Hatch**. Senator Specter?

Senator **Specter**. Thank you, Mr. Chairman.

Mr. Brosnahan, I understand the difficulty of going back so far in time. You are an experienced trial lawyer and have demonstrated that in the responses you have made here today. There are a couple of lines I would like to pursue with you.

You did not come forward in 1971, and I can understand the reasons you have given for not doing so. Did you have a feeling that what Justice Rehnquist had done in 1962 was questionable?

Mr. **Brosnahan**. Yes, I did. I had that feeling at that time, in 1962, and I have retained that, I think, through the years.

Senator **Specter**. I am asking whether you thought it was questionable as opposed to wrong.

Did you think it was wrong?

Mr. **Brosnahan**. Well, I thought it was wrong; I did.

Senator **Specter**. Well, thinking that, why didn't you volunteer to come forward in 1971?

Mr. **Brosnahan**. I guess the main reason was I did not know—I suppose, as you say, I try cases, like one witness of many—I did not know there were lots of other pieces of testimony or whatever, and I did not have any idea that this committee was considering the issue of south Phoenix—in various years, not just 1962, but in various years.

Why I did not know that, I do not know if I was in trial, or where I was, I do not know. But I know that it astounded me—I am talking about my personal reaction—when somebody sent me the testimony, say, a week ago, Senator, and I read all the discussion about south Phoenix. That was after I had given my statement to the Nation Institute. And then I received the transcript. Then I knew for the first time that in 1971, when being confirmed for the United States Supreme Court, the question had been inquired into and that then Justice-designate Rehnquist had given a long letter after the hearing.

Senator **Specter**. I understand your position and why you are coming forward now. But I was probing—I know it is hard to recollect or reconstruct—but in 1971, you were an experienced lawyer, and were very much concerned with the Supreme Court of the United States. I am trying to get straight in my own mind the degree to which you thought his conduct was questionable or wrongful, based on the information that you have.

You know as an experienced trial lawyer that one, tiny fact sometimes leads to another, and it is the smallest matter which can somehow lead to the most important conclusions as an investigator.

Mr. BROSNAHAN. I guess I thought it was questionable and I thought it was wrong. It would be hard for me to say exactly why I did not come forward. It may have been the same atmosphere in 1971 that caused this committee perhaps not to go deeply into the matter of south Phoenix. For example, the office of the U.S. attorney in Phoenix then was happily a very small one; there were three assistants and the U.S. attorney whose names were known, and yet nobody ever came to me and said, "Well, what happened in south Phoenix in the years that you were there or the year that you were there?"

So——

Senator SPECTER. I think that is because the committee never focused the issue. I was not here.

Mr. BROSNAHAN. Well, that may be, that may be.

Senator SPECTER. But you have focused on the issue. You were there.

Mr. BROSNAHAN. I had focused on it to this extent, that when somebody would mention Justice Rehnquist, or when I would see him, which I have done four or five times over the last 15 years, one place or another, I would remember this incident, but not in the sense that I had any knowledge that your committee was going into it or that I should volunteer or come forward. And as a matter of fact, whether this is good or bad, I did not volunteer this time. I did not. Maybe I should have. But somebody called me and asked me and I told them what I remembered, and that is the way it happened this time.

Senator SPECTER. Well, if you had evidence in 1971, which would have been disqualifying, would you not have volunteered and come forward?

Mr. BROSNAHAN. I think that there is some level at which I would get the feeling that I should come to the committee and I should volunteer. And I suppose that could have occurred. It did not occur in 1971, for the reasons that I have given you.

Senator SPECTER. Do you recall why you went to the polling place, and what specific complaints you had?

Mr. BROSNAHAN. I remember that we went there because there were complaints. As to what the specific complaints were, I cannot say. It had to do—and this is the question of recollection—it had to do with the aggressiveness of the challenging. And at some level of my consciousness, I am sure that it had something to do with that kind of a thing. And we went out there to determine what was going on and who was involved, and so forth.

Senator SPECTER. Were there other challengers there in addition to Justice Rehnquist?

Mr. BROSNAHAN. To my recollection, no. He was the challenger.

Senator SPECTER. Was there customarily one challenger to each polling place?

Mr. BROSNAHAN. That is my recollection, from each party.

Senator SPECTER. You testified, Mr. Brosnahan, that there were words and gestures of members in the line that signified to you that that they were glad you were there. Can you be more specific as to what words, what gestures?

Mr. **Brosnahan**. The words were: "All right, that is good. You should be here. I am glad you are here. Maybe we can tell you what is going on," or whatever—words along that line. And Senator, you understand I am not trying to give you a verbatim account of the words used. But the reaction on the line was one of they were pleased that we had arrived. That is the best way I can say it.

Senator **Specter**. Mr. Brosnahan, I do not think the record is clear on the evidenciary or factual basis for your conclusion that he was a challenger. At one point, you said he did not deny he was a challenger, and I believe Senator Hatch quoted from a newspaper clip where you said that be told you he was a challenger.

Do you recall which, if either?

Mr. **Brosnahan**. The basis for knowing that he was a challenger was first of all, he was in that position, as I recall it—that is to say, the physical position, behind the table and acting as such, No. 1.

No. 2, we were told by people who were there that he had been acting as a challenger.

No. 3, my recollection is that there was no denial by him of that, and the answer——

Senator **Specter**. When you say "no denial," was he confronted with it? Was it an adoptive admission?

Mr. **Brosnahan**. I know that we talked to him about it. I know that.

Senator **Specter**. You talked to him about it.

Mr. **Brosnahan**. Yes.

Senator **Specter**. And the issue came up in your conversation of his categorization as a challenger, and he did not deny it?

Mr. **Brosnahan**. No; the issue precisely was what is going on here. We have complaints, some of which came from people who were there; others, which were recounted about people who had left. And the question was, "What have you been doing?" It was that kind of situation. And I showed him identification; so did the FBI agent—as we always do, by the way; that is just routine, you just show your identification. The question is, "What have you been doing here at this precinct, and what is going on?"

Well, he made a response. I could guess at what it was. I am sure that it had to do with the right to have challenges there, which is true—challengers, that is true—something along those lines. And we listened to that; we listened to the other people. The FBI agent did a more formal interview of people, going around, talking to people, trying to find out what was going on in the precinct.

We gathered that information. We were there 15 or 20 minutes, something like that, and it was very calm when we left. And we withrew and went back and resumed other duties.

Senator **Specter**. Mr. Brosnahan, I think you described the role of a challenger as one who confronts prospective voters, and I think you said that, hopefully they would be intimidated?

Mr. **Brosnahan**. Well, first of all, there is a legitimate function for a challenger.

Senator **Specter**. Well, that is precisely what I was about to ask you.

Mr. **Brosnahan**. OK.

Senator **Specter**. Let me try to expedite this by asking a series of questions.

Mr. BROSNAHAN. Sure.

Senator SPECTER. The role of the challenger is to challenge the voters to see if they are qualified. Now, how do you do that properly, short of inappropriate intimidation, without some evidence of criminal wrongdoing.

Mr. BROSNAHAN. Here is the point. You go out and check ahead of time, and you go down the voting list, and you find someone, Mr. Jones, is listed as living at a certain address, and you go there and you look, and there is no house there. And you go back, and you wait. And then when a man comes up and says, "I am Mr. Jones, and I live at this house," you as the challenger for either party—it does not matter—say, "I challenge this person. I have checked. There is no house." That is a legitimate function.

What is not a legitimate function is to look at a line of black and Hispanic people and, in a loud voice, go down that line and say, "I do not think this one and this one and this one and this one and this one can read," when you have no basis, no basis factually, to think that that is true. That to me at some level is an illegitimate series of challenges. That is not provided for, or was not provided for, past tense, by the law in Arizona as I understood it, and it was not a proper way to do it. And that is the distinction that I think I am trying to explain.

Senator SPECTER. All right. That is the hypothetical distinction. But as you say, there was no evidence that Justice Rehnquist did that.

Mr. BROSNAHAN. As I have said, for me to try to recall the specifics would not be fair.

Senator SPECTER. Well, is it a fair and accurate conclusion that there was not that evidence because there was no criminal charge filed?

Mr. BROSNAHAN. No. The reason there was no criminal charge filed as to any of the challengers was that as a matter of prosecutorial discretion, it was declined. It did not make a good criminal case. The various situations were situations in which there were contests and disputes and it simply did not make a good criminal case.

Senator SPECTER. Thank you very much, Mr. Brosnahan.

Thank you, Mr. Chairman.

Mr. BROSNAHAN. Thank you.

Senator HATCH. Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

Mr. Brosnahan, I first want to say to you that I have sat through many hearings in the U.S. Senate, many different committees, and in all of them, I have never seen a more courageous, or finer American than you. There is not one of us sitting up here at the table who does not appreciate the kind of sensitivity of a member of a large law firm, undoubtedly a corporate law firm, undoubtedly a firm that has many members of the Justice's party in it—it would be normal—knowing full well that you could indicate you could not make the hearing, that you were too tied up, that you were not under subpoena, that you did not want to come or were unwilling to come.

And I just have to say to you that I as one American appreciate that which is obvious about your appearance, and that is that you just felt that to do anything other than to appear would have probably been irresponsible, and would have made it very difficult for you to live with yourself.

Is that a pretty fair statement?

Mr. Brosnahan. Thank you. That is a fair statement. Thank you.

Senator Metzenbaum. Because you come before this committee in the most important issue of this hearing, the issue of the veracity, the truthfulness of a nominee Chief Justice of the Supreme Court who, by all published accounts, is expected to be confirmed.

Your testimony relates directly to the Justice's statement in 1971: "In none of those years did I personally engage in challenging the qualifications of any voters," and then his responses under oath to me yesterday or the day before.

> Senator Metzenbaum. Did you ever approach any voters during this period about which we are speaking in the polling booths and speak to them regarding their qualifications to vote?
>
> No, I do not believe I did.
>
> Did you ever ask a voter any questions regarding his or her qualifications to vote?
>
> Justice. In the process of challenging them?
>
> Senator. In the matter of being in a voting booth, in a voting booth, around a voting booth.
>
> No, certainly not in a voting booth.
>
> Did you do it at any time?
>
> Not that I can recall.

I subsequently clarified that it did not have to be a voting booth; it was a voting place.

And then, back to the same issue.

> Senator. Did you ever personally confront voters at Bethune Precinct?
>
> Justice. Confront them in the sense of harassment, harassing or intimidating?
>
> Senator. No, in the sense of questioning them, asking them about their right to vote, asking them about the Constitution, asking them to read something, asking them questions having to do with their voter eligibility.
>
> Justice. And does this cover Bethune Precinct for all years?
>
> Senator. Yes, yes. Did you ever personally confront?
>
> Justice. I do not believe I did.
>
> Would you categorically say you did not?
>
> If it covers 1953 to 1969, I do not think I could really categorically say about anything.
>
> Senator. Do you think at some time, some point, you did personally confront voters at Bethune Precinct?
>
> No. No, I do not.

Then, the Justice stated in 1971 at the hearing:

> My responsibilities as I recall them were never those of a challenger, but as one of a group of lawyers working for the Republican Party in Maricopa County who attempted to supply legal advice to persons who were challengers. We had situations where our challengers were excluded from precincts, where we felt by law they were entitled to get into, and I might say our challenging efforts were directed not to black precincts as such—not to black precincts as such—but to any precinct where there was a heavy preponderance of Democratic voting.
>
> And as the matter was worked out, what we finally developed was kind of a system of arbitration whereby my counterpart, who was for a couple elections Chairman of the Democratic Lawyers and I, the Chairman of the Republican Lawyers, tried to arbitrate disputes that arose. And frequently, the both of us would go together to a polling place and try to decide on the basis of a very hurried view of the facts who was in the right and who was in the wrong.
>
> And I can remember an occasion in which I felt that a couple of our challengers were being vehement and overbearing in a manner that was neither proper nor permitted by law, and of telling them so.

Did Justice Rehnquist—who was not a Justice at that time—did he admit to you that he was challenging voters?

Mr. **Brosnahan**. Yes.

Senator **Metzenbaum**. I think in a statement you made—I will ask you if these are accurate reflections of your views:

> Thus, in resonse to complaints, Brosnahan and an unknown special agent of the Phoenix office of the FBI went to south Phoenix, to a school, possibly Bethune School, to determine the validity of the complaints and/or violations of Federal law.

You have already said that is correct.

Mr. **Brosnahan**. Yes.

Senator **Metzenbaum** [reading]:

> Brosnahan saw William Rehnquist, whom he knew as "Bill Rehnquist", at a table with voting officials. Brosnahan explained that he had met Rehnquist previously and was aware he was a Phoenix attorney who had been a United States Supreme Court Justice's clerk. Brosnahan had said hello to Rehnquist in the past and had seen him on social occasions.
>
> Brosnahan explained he was not a friend or"——.

Mr. **Brosnahan**. Senator, can I interrupt you? I am sorry. I do not know that I have ever seen him on social occasions. I probably saw him at a Bar Association or something like that, but we never socialized that I can remember.

Senator **Metzenbaum**. Did you on one occasion introduce your wife to Mr. Rehnquist at a random meeting outside the Phoenix Federal Building?

Mr. **Brosnahan**. In front of the Federal building one evening, my wife picked me up, and then as he was called "Bill" Rehnquist was walking along, and I introduced her to him, and we exchanged pleasantries, and he left.

Senator **Metzenbaum**. I think in the same statement you indicated that the voters at that location were mostly black and Hispanic; is that correct?

Mr. **Brosnahan**. That is true.

Senator **Metzenbaum**. The statement further says:

> Upon Brosnahan's arrival, he observed the delays and confrontational-type challengers. He opined the challengers were blanket challenging the black and Hispanic voters. He estimated possibly 75 percent of the voters present in line were being challenged.

Is that your——.

Mr. **Brosnahan**. That is as to the general complaints we received that day from a number of precincts, not necessarily the one at which Mr. Rehnquist was present.

Senator **Metzenbaum**. After you arrived, the situation became less tense, and voting was continued at a regular pace?

Mr. **Brosnahan**. That is true.

Senator **Metzenbaum** [reading]:

> Brosnahan was told by a person or persons unknown that Rehnquist was challenging, and in conversation with Brosnahan, Rehnquist stated to Brosnahan that Rehnquist was a challenger.

Mr. **Brosnahan**. That is true.

Senator **Metzenbaum**. That is true. He told you he was a challenger?

Mr. **Brosnahan**. Because we talked about the complaints in terms of, "This is said; what do you say about it?" and he made a response to that. At no time did he ever say, "I was not a challenger," or "I was not doing this" or "It is not me, it is somebody else."

Senator **Metzenbaum** [reading]:

> It is Brosnahan's opinion that Rehnquist was not there as peacekeeper or overseer, but it appeared Rehnquist was of a confrontational attitude to discourage primarily Democratic precinct voters who were mostly black and Hispanic.

Mr. **Brosnahan**. I have absolutely no question that at that time at that precinct in 1962, we did not have the benefit of any assistance in peacekeeping, or anything of that kind.

Senator **Metzenbaum** [reading]:

> Brosnahan concluded by stating that it was his opinion that the total purpose of the confrontational challenges was to discourage black and Hispanic voters who were predominantly Democratic voters from voting. It was Brosnahan's recollection that on the above date, challenges were indiscriminately made, and voters were requested to read portions of the Constitution. He reiterated that the normal basis for a challenge was a question of the voter's eligibility and validity to vote. This was not the case on November 6, 1962, according to Brosnahan.

Mr. **Brosnahan**. That is true.

Senator **Metzenbaum**. So that is it fair to say that your recollection and your testimony under oath is that, notwithstanding the representations of Justice Rehnquist in 1971 and again in 1986, a few days ago, that indeed, Justice Rehnquist was a challenger at the precinct?

Mr. **Brosnahan**. That is true.

Senator **Metzenbaum**. I have no further questions, Mr. Chairman.

Senator **Hatch**. Senator DeConcini.

Senator **DeConcini**. Mr. Brosnahan, I join with Senator Metzenbaum as to your coming here and being part of this process. I must say that I admire that, and I appreciate you doing that.

I think we are addressing indeed a very important subject matter here, not only as to the question of veracity of Mr. Rehnquist, but also whether or not there is sufficient evidence brought forward to overcome his denial and other statements that have been given that indicate that he was a peacemaker or legal adviser to the Republican Party. I for one remember very well those years, because I was on what was known as the Democratic truth squad of lawyers and law students in Pima County to circumvent what we felt was outrageous conduct by the Republican Party, and that was my own view. However, when I went to the polls because of Republican challenges in Pima County, we had some arguments and disagreements, but I could not remember today first who I saw there, except one Republican—there were a number of them—nor could I remember that anyone broke any law. They were challenging, and we did not like it because it upset those in line, and they wanted to go home, go to work, or whatever the case was, and it slowed things down. But we, to my recollection, did not have any prosecution, nor did they do anything legally wrong, although in my judgment it was wrong to do what they were doing.

Whatever Mr. Rehnquist was doing here, if in fact he was challenging, as you have said—he refutes that—he did not break the law. Is that your observation, or your opinion?

Mr. **Brosnahan**. Well, first of all, just to say what I know, there was no criminal prosecution of anyone, including Mr. Rehnquist. As to whether he broke the law or not, it would turn on the question of whether it was lawful to have blanket or broad challenges to lots of people, which in turn would turn on the facts with regard to what it is that he did. And——

Senator DECONCINI. So we do not know; we are unable to——

Mr. BROSNAHAN. I am unable to go beyond what I just said to you.

Senator DECONCINI. We do not have an answer to the question.

Now, my recollection probably is, like yours, a little bit murky as to what the Arizona law was at the point. You pointed out one provision of challenge as to residency. My recollection—and I would appreciate you correcting me; I do not have that statute here—is that you could also question whether or not a person could read the English language——

Mr. BROSNAHAN. That——

Senator DECONCINI [continuing]. Let me finish—and that the voting poll judge, who was the elected official there to conduct the operation of the poll, had a card, in fact, that he would present upon request of a challenger to a particular voter—that is the way I saw it done, at least, when it was done what I thought was correct—and that that voting poll judge would then ask the person to read this. If they could not, the voting poll made a judgment right there or not, whether or not to give the person a ballot.

Is that your recollection of the contest as to the right to read the English language?

Mr. BROSNAHAN. I am speaking, of course, as to just the one year 1962. My understanding is that it was the law at that time, later held unconstitutional.

Senator DECONCINI. Right.

Mr. BROSNAHAN. But in 1962, it was the law in Arizona that you had to be able to read in order to vote. As I understood it, a challenge with regard to that question of reading was not made of every person. For example—and I am pretty sure on this—I used to vote in those days, and nobody showed me a card and asked me if I could read.

Senator DECONCINI. Yes, but I am not——

Mr. BROSNAHAN. And I think I would remember it if they had. So I do not think on the one point, I do not think that there was an official whose job it was to ask each voter whether they could read——

Senator DECONCINI. I am not suggesting that there was. What I am suggesting—what I would like to know is whether or not you concur that that was the way a challenger, Democrat or Republican, in this case Republican, challenger should have gone about challenging someone if they felt they did not know how to read, was to direct that inquiry to the voting judge, who had the list, or had the people there, and ask him to make that judgment and make that presentation.

Mr. BROSNAHAN. I think that I absolutely agree that if there was any kind of challenge, it should be referred to the official—and you might know the title, and I do not—of the person who is going to resolve that. And that was one of the problems in 1962, is that that was not the system being used broadly, No. 1.

No. 2, it was my understanding that before you challenged a particular voter, you ought to have some basis for that challenge, whatever that would be, and that you could not make and should not make—whatever the word is——indiscriminate challenges of lots of people without a basis to believe that the challenge was a good one.

Senator DeConcini. Well, let me ask a hypothetical. If you had the right to challenge—which I abhor that that happened to be in the Arizona law, and I am very embarrassed that it was, but it was, and I had nothing to do with putting it in there—but that being the case, that you had to write or, as a requirement of voting, you had to prove that you could read, hypothetically, how would you ever challenge someone if you did not ask them to read something?

Mr. Brosnahan. Well, you would do it, I suppose, the same way that you would prepare yourself to challenge other people. In fact, as I recall it, the Republican Party—and probably Democrats, too—had done some homework in terms of addresses, and they would mail out letters and get things back. And I suppose you could do some homework and try to get a basis for a particular challenge.

Senator DeConcini. But what homework would you think they could do as to whether or not they could read? Whether or not there is a house there, you mail something, and it comes back, or you go see it physically.

Mr. Brosnahan. No, that is right. You would have to do some form, I suppose, of checking the way they do in the other areas, No. 1. But No. 2——

Senator DeConcini. What other areas?

Mr. Brosnahan. Well, for example, I would not—I am just giving you my opinion—I think most everybody in that line could read, and that is——

Senator DeConcini. Well, that is not my question. I will ask it so it is in the record. In your opinion, could everybody in the line read?

Mr. Brosnahan. I cannot say with regard to that.

Senator DeConcini. Well, do you think that they could read?

Mr. Brosnahan. Yes, I would say most of them, I am sure, could read.

Senator DeConcini. Fine; that is really not what I am getting at. What I am getting at is that as I remember the law in Arizona, that there was a right to ask you or Dennis DeConcini, if he was registered to vote, to read something if the judge or the challenger asked the judge to do so. Now, they did not do it, and it was unfair as hell, and they did it in minority precincts, the Republicans did it, in order to deter Democrats from voting, and if nothing else, to slow up the line. And that was very clear what it was all about.

My point is, notwithstanding how abhorrent that is, if someone did it in accordance with the law, they did not break the law, obviously, even though in your moral judgment and mine and others, it was wrong.

So if Mr. Rehnquist was complying with the law there and either asking people himself—and we do not know that that was illegal, because you cannot say for certain, and I cannot say; we do know, quote, "harassment" is illegal, and I do not know that that is; I can conjure that up—but if he was complying with the law, he is only guilty, in my judgment, of doing something that I thought was wrong, and not something that was a violation of a law. And likewise, the Justice Department, under your testimony, investigated that and concluded that he did nothing wrong.

Mr. **Brosnahan**. You know, the only thing I can give you—and you would be the one that would know a lot more about this, I am sure—the only thing I can give you is my understanding formed at the time in 1962, which was that before a challenger from a party could challenge one person, and certainly before they could challenge lots of people, which had the effect of obstructing the flow of voters, that you had to have a basis of some kind for that challenge. Now, all that is, Senator, is my recollection. I have not gone back to try to research that point or anything of that kind.

Senator **DeConcini**. You worked for Carl Michie?

Mr. **Brosnahan**. Yes.

Senator **DeConcini**. Now, he gave a statement on this issue back in 1962. He said he received a report of an incident at the Bethune precinct himself, and he went there to investigate. When he arrived, he was notified of irregular practices in the challenge of voters.

"He," meaning Mr. Michie, "says he is not aware of anything more than minor irregularities." Now he is referring to the Bethune precinct. "He is certain Justice Rehnquist was not present at the Bethune precinct. Judge Michie told the Arizona Republic this week"—that is back in 1971—"that there never was talk about prosecuting Republicans for their challenge activities.

"He went on to say that he knew Bill Rehnquist at the time, and never saw him do anything. Michie said that he did not think Republicans actually were preventing people from voting in 1962, but he said they were holding up lines and causing delays. Democrats at the same time were being accused of handing out campaign literature too close to the polls."

Excuse me. I stand corrected. I was reading from an 1986 report, so this was very current that Michie just said what I said, and not in 1971.

And what I ask you is that you cannot substantiate from your memory, nor can Mr. Rehnquist, what precinct you and he met each other.

Mr. **Brosnahan**. I think that is true.

Senator **DeConcini**. That is true. So, we have a big disagreement here of a fact as to whether or not you both were in the same precinct and what action Mr. Rehnquist took.

Mr. **Brosnahan**. No, Senator—I mean, as far as what my testimony is, we were both in the same precinct, and we were there at one time together.

Senator **DeConcini**. Yes, all right.

Mr. **Brosnahan**. But which precinct that was is another question.

Senator **DeConcini**. You do not know. All right.

Mr. **Brosnahan**. Right.

Senator **DeConcini**. Was Mr. Benson—did you ever come across Wayne Benson's name?

[Pause.]

Mr. **Brosnahan**. I cannot say that.

Senator **DeConcini**. Apparently, you do not remember Wayne Benson.

Mr. Brosnahan. I cannot say that, no.

Senator DeConcini. Because it appears to me that we are talking about another precinct than the Bethune precinct as to where you encountered Mr. Rehnquist, because Mr. Benson was at Bethune precinct, and he accordingly was escorted out of that precinct, and several people said they saw Mr. Rehnquist there. You did not have any familiarity with any incident involving a Mr. Benson?

Mr. Brosnahan. There were other incidents, and the name is familiar, but I think I may have read it in a clipping. So I am not sure.

Senator DeConcini. What about any other—you testified to Senator Specter that there were no other Republican officials there at the precinct you were at——

Mr. Brosnahan. That is right, right.

Senator DeConcini [continuing]. When Mr. Rehnquist was there. Were there any Democratic officials of the Democratic Party?

Mr. Brosnahan. I think so

Senator Hatch. Would the Senator yield on that one point——

Senator DeConcini. Yes, I would.

Senator Hatch. When I was asking questions, you had difficulty remembering whether this was Bethune or not.

Mr. Brosnahan. What I have said is that I am not sure what the name of the precinct was.

Senator Hatch. Yes, that is it.

Mr. Brosnahan. Right.

Senator Hatch. And the Arizona Republic—this may refresh your recollection—on November 7, 1962, did say:

> The scuffle came at a polling place in Mary MacLeod Bethune School.

And they give the address.

> Where opposing party watchers struggled briefly inside, and an angry crowd gathered outside. Police hustled the combatants inside the nurse's office, and Mrs. Ellen Jane Greer, Deputy County Attorney, restored order. The U.S. District Attorney's Office made two checks at the polling place after receiving repeated complaints. The first was made at 11 a.m., and the second at the request of Senator Hayden at about 4:30 p.m.
>
> The first investigation was made by William J. Knudson, Jr.

That is the FBI agent who was with you, I presume——

Mr. Brosnahan. No, that name is of an Assistant U.S. Attorney in the Phoenix office at that time

Senator Hatch. OK. It says, "The first investigation was made by William J. Knudson, Jr. and James J. Brosnahan, Assistant District Attorneys, on reports that the voting line was being delayed by the challenges."

That basically establishes that it was at the Bethune School. There had been a scuffle——

Mr. Brosnahan. No, I do not know that the Senator is——

Senator Hatch. I do not know how you can say no. It is right here in the newspaper.

Mr. Brosnahan. No, I do not know that the Senator is recalling what I said.

Senator Hatch. OK.

Mr. Brosnahan. I said that I went to—and I said this earlier—perhaps two or three different places in the course of that day. The article that you are reading from recalls that Mr. Knudson—it says

Mr. Knudson and I went to the Bethune School in the morning, I think, around 11 a.m. or 12 noon or something like that, and Mr. Michie went there around 4 p.m., and there was a scuffle. And I do not recall whether the scuffle was early or late; I do not know.

Senator DECONCINI. Mr. ——

Senator HATCH. Excuse me. Go ahead, Senator.

Senator DECONCINI. If I may continue, Mr. Chairman.

Senator HATCH. Surely.

Senator DECONCINI. I want to ask you this question, Mr. Brosnahan. You said you recalled that you think there were other Democratic officials there?

Mr. BROSNAHAN. I am pretty sure there were.

Senator DECONCINI. Do you recall who they might have been?

Mr. BROSNAHAN. No.

Senator DECONCINI. Was one of them a party chairman, do you remember?

Mr. BROSNAHAN. A party chairman in terms of Maricopa County?

Senator DECONCINI. A chairman of the Democratic Party.

Mr. BROSNAHAN. I do not recall that.

Senator DECONCINI. Does the name Charlie Hardy refresh your memory at all?

Mr. BROSNAHAN. Not as to him being at a specific precinct. But of course, I knew him in those days, and he is now a Federal judge, so I know who he is.

Senator DECONCINI. He is a Federal judge, and he says that on occasion, both in 1962 and 1964, he visited various polling places with Bill Rehnquist in order to check the challenges and what the process was.

But you do not recall—do you know who Charlie Hardy is?

Mr. BROSNAHAN. I know who Charlie Hardy is, but——

Senator DECONCINI. You do not recall him being there?

Mr. BROSNAHAN. I recall—well, my recollection is that there was one Democratic challenger there, and that is—that is what I am sure of——

Senator DECONCINI. And you do not know who it was?

Mr. BROSNAHAN [continuing]. And beyond that—and I do not know who that person was.

Senator DECONCINI. Who was the agent that went with you, the FBI agent, do you remember?

Mr. BROSNAHAN. I do not have the name of the agent. It would have been somebody assigned to that task, and not necessarily somebody whom I would work with on other cases. You can check this. My recollection is there were maybe 50 FBI agents in Phoenix at that time.

Senator DECONCINI. Fifty?

Mr. BROSNAHAN. That is my recollection; some figure like that.

Senator HATCH. Senator DeConcini, can I just interrupt you for a second? I am going to go vote, and what I would like to do if you finish is have Senator Heflin begin his questioning.

Senator DECONCINI. I think everybody had better go vote.

Senator HEFLIN. Yes, I had better go vote, too.

Senator HATCH. Maybe we had better all go and vote.

Senator DECONCINI. Let me just finish this line of questioning.

Did you take any notes of this yourself, or was that left for the FBI agent?

Mr. BROSNAHAN. I do not remember. It probably was left to the FBI agent, would be my best estimate at this point. He would be more official in the sense that he would be getting the detailed information and recording it in some fashion.

Senator DECONCINI. When you came into the voting place, do you remember where Mr. Rehnquist was? Was he seated?

Mr. BROSNAHAN. My recollection is he was seated behind a table as one of several people who were functioning at that place.

Senator DECONCINI. Which might have been where the judge of the precinct, the person in charge of the precinct, would have been sitting?

Mr. BROSNAHAN. I think it was where the judge, or whatever you call that person——

Senator DECONCINI. Yes, the official——

Mr. BROSNAHAN. The official for the precinct, yes.

Senator DECONCINI. And when you saw him, did he get up and come talk to you?

Mr. BROSNAHAN. At some point, we got up and got it to the side. We were trying to do a couple things. One was we were trying to quiet the situation down. That was the first thing. No. 2, we were trying to find out what happened, and we did that by talking to various people. And No. 3, he was one of the people we talked to. And my best recollection is that we did get over to the side somewhere to sort of discuss, well, what is your recollection, or what is your understanding of what is going on here, and that we got him over to one side and got his side of the story.

Senator DECONCINI. And that side of the story was that he was doing what was legal in his opinion, or do you recall?

Mr. BROSNAHAN. I am sure that in some form, with some words, he told us that whatever it is he had done, he thought was appropriate. I am sure that is true.

Senator DECONCINI. And what did you think?

Mr. BROSNAHAN. I did not think it was appropriate.

Senator DECONCINI. Did you tell him that what he said he had done, that you thought it was inappropriate?

Mr. BROSNAHAN. I could have, I could have. I cannot tell you that now. I hope I was trying to be professional and sort of "What has happened here?" and that kind—it was a somewhat volatile situation, and our goal was not to inflame it.

Senator DECONCINI. Was he professional in telling you whatever he told you?

Mr. BROSNAHAN. He was subdued at that point, I thought.

Senator DECONCINI. He was subdued. Well, was he professional?

Mr. BROSNAHAN. Well, he was responsive.

Senator DECONCINI. He was responsive, and he was answering your questions?

Mr. BROSNAHAN. Yes.

Senator DECONCINI. He did not tell you—did he tell you that he was a lawyer, and he did not have to answer your questions, or anything like that?

Mr. BROSNAHAN. I knew he was a lawyer, and he did not refuse to answer any of my——

Senator DeConcini. He did not; he cooperated?

Mr. Brosnahan. It is fair to say he cooperated.

Senator DeConcini. Thank you.

Do you know what time of day it was? Was it in the morning or afternoon?

Mr. Brosnahan. I do not really recall that. I really do not recall that.

Senator DeConcini. How many precincts did you visit that election day, do you recall?

Mr. Brosnahan. Two or three.

Senator DeConcini. Two or three. Do you remember going to the Bethune precinct——

Mr. Brosnahan. I think I did.

Senator DeConcini [continuing]. At that particular time?

Mr. Brosnahan. I think I did.

Senator DeConcini. You think you did. When you went there, was Mr. Rehnquist there?

Mr. Brosnahan. I cannot say that.

Senator DeConcini. Do you recall who was at the other precinct? [Pause.]

Do you recall the names of any of the precincts, except you think one of them was——

Mr. Brosnahan. No, I would not remember the names of any of the precincts. You understand I left Arizona in 1963 and was there for 3½ years.

Senator DeConcini. I understand, I understand.

Mr. Brosnahan. So I would not remember the names of the precincts.

Senator DeConcini. But you think one of them was Bethune precinct.

Mr. Brosnahan. I think so. Part of my recollection is the newspaper clipping that Senator Hatch cited, which says that I did go to the Bethune precinct, I think, sometime in the morning.

Senator DeConcini. So your statement is here—so that I can just wind up here—is that from what you were told and could feel, what you could see from those people who were telling you, Mr. Rehnquist was challenging voters?

Mr. Brosnahan. That is true.

Senator DeConcini. And you never saw him challenge any voter.

Mr. Brosnahan. As I have described it, that did not happen while we were there.

Senator DeConcini. I mean, you never saw him challenge any voter, either as to residency or being able to speak or not?

Mr. Brosnahan. No.

Senator DeConcini. Your information comes from what people that were in the polling place conveyed to you?

Mr. Brosnahan. That is correct.

Senator DeConcini. Thank you.

Mr. Brosnahan. May I add one thing? I am sorry. Whatever information I had came from people at the polling place and whatever complaints we had received before we got there.

Senator DeConcini. Which brought you down there.

Mr. Brosnahan. Yes.

Senator DECONCINI. Just like Mr. Maggiore said he went to a voting place at the Bethune precinct; somebody called and said, "Hey, something is going on here."

Mr. BROSNAHAN. Something is going on; right.

Senator DECONCINI. Thank you, Mr. Chairman

The CHAIRMAN. Are they through with this panel?

Senator DECONCINI. No, I do not think they are, Mr. Chairman. Senator Heflin and Senator Simon certainly want to ask some more questions, and they will be right back.

The CHAIRMAN. There is a vote in the Senate, so we will take a recess until some of the members return.

Mr. PINE. How long will that recess be, Mr. Chairman?

The CHAIRMAN. Not over 10 minutes.

Mr PINE. Thank you. I want to know, because I want to know if I have time to get something to eat.

The CHAIRMAN. You will not have time to do that.

Mr. PINE. Thank you.

[Short recess.]

The CHAIRMAN. The committee will come to order.

The distinguished Senator from Alabama.

Senator HEFLIN. I have listened to part of your testimony and read, very hurriedly, a statement that you made, and some things that Senator Specter asked and some questions that Senator DeConcini asked. There are some questions in my mind as I try to understand exactly what your testimony is.

First, in regard to your written testimony, you say here on page 4, which I gather is the major aspect of it,

> I have read the testimony and the letter supplied by Justice Designate William Rehnquist to this Committee in 1971. On Page 71 and 72 of his testimony, he describes his role in the early 1960s as trying to arbitrate disputes at polling places. That is not what Mr. Rehnquist was doing when I saw him on Election Day in 1962.

Are you stating there that you did not see him trying to arbitrate disputes?

Mr. BROSNAHAN. That is true.

Senator HEFLIN. All right. You cannot say whether that day he did or did not at polling places endeavor to try to arbitrate disputes?

Mr. BROSNAHAN. That is also true.

Senator HEFLIN. Now, I gather from what Senator DeConcini has described relative to this that there is some official that is stationed at a polling place, this is a little different from my State and maybe from some other States, who was there to settle disputes as to whether or not someone can vote; and that under the Arizona law, the parties have representatives there and that those representatives have the title of challenger. Is that correct?

Mr. BROSNAHAN. That was my understanding, yes.

Senator HEFLIN. Now, in order to be there to be behind the table, or to be there in any capacity representing the party, is it necessary that you have that title or some other title?

Mr. BROSNAHAN. It was my understanding that, yes, you had to have the title in the sense that your party would designate you to be the challenger for that precinct. That was my understanding.

Senator HEFLIN. Now, a person can be given the title of challenger and never exercise any function as a challenger, can he not?

Mr. **Brosnahan**. That would certainly be possible.

Senator **Heflin**. All right, sir. Now, you next in this statement here say, "At Page 491 of the 1971 record in his letter, William Rehnquist stated, 'In none of these years did I personally engage in challenging the qualifications of any voter.' This does not comport"—and this is your language—"This does not comport with my recollection of the events I witnessed in 1962 when Mr. Rehnquist did serve as a challenger."

Now, will you tell us what you personally saw Mr. Rehnquist do relative to personally engaging in challenging?

Mr. **Brosnahan**. Other than him having a position, Senator, behind a table when I arrived, as far as what I saw—and I am distinguishing, and I think you want me to, what I heard or what I was told by the people in the line, for example, and other officials there. Putting that to one side, I did not see him challenge people while I was there, as far as I can now recall.

Senator **Heflin**. In other words, you never saw him do an overt act of challenging himself, even if he did, at that time, occupy the position of a challenger?

Mr. **Brosnahan**. While I was there, as I recall it, the main activity was not the continuation of the voting, although some of that may have gone on. The main activity was that we were getting answers to our questions from various people so that the process, as best I recall it, was at least slowed down. So there would not be an occasion for somebody to be doing a lot while we were there.

Senator **Heflin**. All right, sir. Now then, if he did perform acts of challenges, as distinguished from bearing the title of challenger, it depended on hearsay of what people told you.

Mr. **Brosnahan**. That is true. In two forms. Whatever it was we heard before we got there, and when we were back at the U.S. attorney's office; and second, whatever we heard once we arrived, as various people, whether they be voters or somebody behind the table, would tell us. And as you say, that was hearsay.

May I add one other thing? And I have been expressing this. When we interviewed Mr. Rehnquist, there was not pending at that time any question about whether he was acting as a challenger. The question, really, was whatever the complaints were about his conduct, that is what we were discussing, and he was giving us the benefit of his side of that story.

Senator **Heflin**. All right, sir. Now, as to whether or not the hearsay accurately depicted whether he was doing overt acts of challenging would depend upon the subjective evaluation of the person that you were interviewing, would it not?

Mr. **Brosnahan**. Well, to some extent. But when somebody tells you right there that this person standing over there has just done something as to whether it is absolutely accurate, that is the question, but not as to whether that person is standing over there. I mean, do you see what I am saying?

In other words, it was pretty clear. There is some subjective element to this, I agree with you, but it was clear that he had been acting as a challenger before we arrived there, and he did not contest that at any time.

Senator **Heflin**. Well, what did they say? In other words, you impress me as being truthful, and I have to admit that Justice Rehnquist impresses me as being truthful.

Now, are we talking about semantics and language?

Mr. **Brosnahan**. I am trying not to.

Senator **Heflin**. You are saying here that he said in his language, as you read in that letter, "In none of these years did I personally engage in challenging the qualifications of any voter." And you have said in your statement, "This does not comport with the recollection of events that I witnessed in 1962 when Mr. Rehnquist did serve as a challenger."

Now, you have not cited any events that you saw to base your statement on. You have said that it was hearsay. Now, what was the hearsay that they told you he was doing?

Mr. **Brosnahan**. Well, what I have given you is my best recollection as an assistant U.S. attorney as to what witnesses at the scene told me what Mr. Rehnquist said. When you get to the question which you have now raised as to what was the nature of the complaint, it is clear to me they were complaining. It is also clear to me that it had to do with his conduct.

But when you get to that point and say what were the precise complaints, what was the conduct, and what was Mr. Rehnquist's response, and I have thought a lot about that, Senator. I am concerned that if I attempt that, that I might be unfair in some way or inaccurate in some way.

I think we have probably reached the outer limit of my recollection when we get to that point.

Senator **Heflin**. In other words, you are telling me that you cannot remember what the complaints were, but your overall evaluation of the complaints made to you was that he was doing some type of overt act of challenging?

Mr. **Brosnahan**. That is true.

Senator **Heflin**. But you cannot remember it.

Now, all of that is hearsay, and actually I do not——

Mr. **Brosnahan**. It is not—I am sorry.

Senator **Heflin**. Well, I mean, if you were testifying in court and an objection was made, basically because they have got new rules of Federal evidence, and I am not exactly sure where we are now with them; but in the days when I was trying lawsuits, an objection would have prevented you from testifying to the conclusion that you have testified, would it not?

Mr. **Brosnahan**. No, it would not as to at least this part. I showed—as he was then called—Bill Rehnquist my identification. That is not hearsay.

I understand. I am just trying to explain it. By the way, when I am in court, my objections do not always get ruled on the right way, anyway.

When the FBI agent showed him his identification, that is not hearsay. When we took him somewhere to talk with him about what it is he had been doing, the fact that we talked with him is not hearsay. The fact that we were there is not hearsay. The gestures and signs from the people in the line before you get to the content of what they said, that is not hearsay.

It is true, and it is part of the situation, that the specific complaints, whatever those were, would be the statements of people who were there and would have to be weighed in some fair fashion. That is true.

Senator BIDEN. Will my colleague yield for 30 seconds?

Senator HEFLIN. Yes.

Senator BIDEN. Let me ask you this one precise question: When you identified Mr. Rehnquist as a challenger, did anyone with whom you spoke in that line who was complaining about treatment—whether it was legally improper or proper—regardless, without making a judgment, whether it was right or wrong what they were compaining about, did anyone in that line turn and say, "That man, Bill Rehnquist"?

Mr. BROSNAHAN. Yes, and I appreciate the question because nobody has asked me that this morning. A number of people in the line designated Mr. Rehnquist as someone who had been challenging. That is why we went to him. That is why we talked to him.

Senator BIDEN. You have no doubt about that.

Mr. BROSNAHAN. I have no doubt about it.

The thing is that if I tried to tell you this is just the passage of time that the complaint involved or the complaints was this and this and this, I would be very concerned about my recollection. But that people in the line said, "That gentleman over there is the person who is doing the challenging," words to this effect, "we do not like it."

Senator BIDEN. And that gentleman to whom they were referring was Bill Rehnquist.

Mr. BROSNAHAN. Was Bill Rehnquist, that is true.

Senator DECONCINI. Would you yield just for a short question? What did they say that he was doing? Was he doing something illegal?

Mr. BROSNAHAN. That is the point, Senator, that might be a very important point, but it is not one that I can be accurate about.

They were complaining about his conduct.

Senator DECONCINI. He was doing something they did not like.

Mr. BROSNAHAN. Something they did not like. That is certainly true. That is certainly true.

Senator DECONCINI. But in your judgment, you cannot say whether it was illegal?

Mr. BROSNAHAN. No, I cannot. I really cannot.

Senator DECONCINI. You cannot remember that what they told you sounded illegal, like "He hit me"?

Mr. BROSNAHAN. It was nothing like that.

Senator DECONCINI. Well, I mean, that obviously would be illegal.

Mr. BROSNAHAN. Well, I know, but there was nothing like that.

But there were complaints, and I do not think they were stated in legal terms, complaints about the conduct at some level being certainly something they did not like.

Senator DECONCINI. Improper, in their view?

Mr. BROSNAHAN. In their view, certainly.

Senator DECONCINI. I thank the Senator from Alabama.

Senator HEFLIN. Well, I think maybe Senator Biden has clarified more of what you did. I think I did not give you the opportunity to answer that when I asked you about what they did. When you said what you did, that was in answer to a general question. But that still leaves us somewhat in the dark, now, for 25 years about how somebody could point and say that this is the judge and I am whispering something to him, and I turn and look at him or do something else. The subjective evaluation that I would be talking about Joe Biden or that I am talking about somebody else is a subjective evaluation as to what it was that he did that they challenged.

Well, I think this is more a matter of semantics of the language in your statement as to what we can establish and say is based on evidence that you saw. And I am assuming you are telling the truth. I think you are endeavoring to do so.

But to try to do so where it is not the inner workings of your mind and your evaluation, rather based strictly on evidence, I am not sure about your statement there, that "This does not comport with my recollection of events I witnessed in 1962 when Mr. Rehnquist did serve as a challenger."

Mr. **BROSNAHAN**. I hope I have not at any time tried to characterize or make a judgment about Justice Rehnquist's testimony. I do not think that is my function, and I have tried not to do that.

But when I refer here to what I witnessed, I am referring to the arrival, the receipt of the complaint, the interview of Mr. Rehnquist, and those are the events that I am referring to.

How you are going to weigh all that together, that is really for the committee.

Senator **BIDEN**. Let me just make sure, since I just asked the question, and I apologize to my colleague from Illinois. I thought I asked you a question that was objective. Not that the question was objective; asking for an objective judgment. I want to make sure I have got it straight because it is really important to me.

Mr. **BROSNAHAN**. Yes.

Senator **BIDEN**. Are you swearing under oath that you in the polling place that we have been referring to were told by specific people standing in the line that Bill Rehnquist—either by name or by gesturing to him—was the person responsible for their unhappiness?

Mr. **BROSNAHAN**. Yes.

Senator **BIDEN**. So there is nothing subjective about that. You are swearing under oath that you saw and heard an individual say to you, "That person sitting at that seat is the cause of my unhappiness here"?

Mr. **BROSNAHAN**. That is correct.

Senator **DECONCINI**. But not necessarily that he was challenging; that he just did something they did not like.

Mr. **BROSNAHAN**. No, oh, no.

Senator **DECONCINI**. What was it?

Mr. **BROSNAHAN**. The thing they did not like was the challenging.

Senator **DECONCINI**. What was that?

Mr. **BROSNAHAN**. That is what you and I have discussed which is beyond my recollection. But the thing they did not like, Senator, was the challenging. It is not anything other than that.

Senator **BIDEN** [presiding]. The Senator from Illinois. I apologize for the interruption.

Senator **SIMON**. Thank you, Mr. Chairman.

Senator BIDEN. But I so seldom get to be chairman any more, now that we are in the minority. I just took advantage of it.

Senator SIMON. I am glad you have taken over as chairman here. I knew it was going to happen sooner or later, but I am glad it has happened now.

Senator BIDEN. I am not sure what means, but I will let it go.

Senator SIMON. Mr. Brosnahan, when you went out there, do you remember the complaints that caused you to go out? Were the complaints about the conduct of Mr. Rehnquist?

Mr. BROSNAHAN. Yes; the complaints, whether the name was mentioned or not—to try to be square-cornered about it—whether the name was mentioned, I would not remember now.

We received complaints that at this precinct there was what we thought was a serious problem. And then we went there in response to those complaints.

Senator SIMON. You referred to gestures that you saw as you drove up or walked up to indicate that there were problems. What kind of gestures are you talking about?

Mr. BROSNAHAN. The best recollection I have is that, first of all, we came up and they kind of looked at us, and we showed our identification and probably said who we were to the people behind. And as the people in the immediate line heard that, they responded. And they responded by saying or showing that they were very glad we were there.

The complaints were with regard to Mr. Rehnquist, and by sign or some fashion, that was indicated. Plus, when we talked to people, that is what they were talking about.

Senator SIMON. When you said he was challenging them, was he challenging one or two people, or do you have the impression it was a larger number? How many people was he challenging that caused the consternation?

Mr. BROSNAHAN. Well, he had been there, he had been challenging enough so that the line responded in a very graphic way. I cannot say how many people he had challenged or anything like that, except that it was enough to cause this line of voters to evidence their real displeasure.

I have a very distinct recollection of that day for that very reason. These were people who wanted to vote, and there was somebody there who was stopping them. Or at least they thought that was the problem.

How many he challenged, I would not be able to say that. I do not think I should try.

Senator SIMON. But it was apparently more than one or two or three?

Mr. BROSNAHAN. Oh, yes.

Senator SIMON. You were with an FBI agent; the FBI agent presumably made a report back to his office. You were an assistant U.S. attorney. Did you make a written report to your office, do you recall?

Mr. BROSNAHAN. I would not have made a written report because I do not think we ever made written reports. We would have received FBI reports over a course of maybe a day or two, and I think on this one, really, the U.S. attorney, Mr. Mickey, would have made the final decision. But I think we would have talked about it to discuss what it was we found and whether this would make a criminal case or not. And I think we pretty well knew, and I should say this, that we were not going to make a criminal case out of it. And when I say "it," I am referring to the different situations and the different precincts.

But one of the things that did occur was that Mr. Mickey was to receive additional FBI reports, and some of the voters who had gone home were being interviewed at home and that kind of thing. And that took a day or two, something like that.

Senator SIMON. You said "we were not going to make a criminal case out of it." In your judgment, was what he did a violation of the law?

Mr. BROSNAHAN. When a judge asks me that, I am usually better prepared than I am to do this. We are talking about 1962 in Arizona.

I can give you my impression of the law at that time, which is what I had at that time. You cannot have blanket challenges of numerous people without a basis for it. And that would be at some level against the law.

That is as close as I can get to it.

Senator SIMON. All right. I think you have answered my questions. I have no further questions, Mr. Chairman.

Senator DECONCINI. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Would the chairman yield to me just long enough. I have secured here a copy of the Arizona statutes, A.R.S. 16.9.11, 921, and it states the grounds for challenging voters at that time. I am going to take a moment and read them real quickly.

A person offering to vote may be orally challenged by any registered elector of the county on any of the following grounds: One, that he is not the person whose name appears on the register; two, that he has not resided within the State for 1 year next preceding the election; three, that he has not resided within the county or precinct for 30 days next preceding the election; four, that he has not voted before at that election; five, that he has—excuse me, that he has voted before at that election; five, that he has been convicted of a felony and has not been restored to his civil rights; six, that he has made a bet on the result of the election—boy, that would hurt. I am glad nobody challenges. In the bars I used to attend in those days—seven, is not being prevented by physical disability from doing so; he is unable to read the Constitution of the United States in the English language in such a manner as to show he is neither prompted nor reciting from memory or he is unable to write his name.

So, Mr. Chairman, I think it is important to realize that this very clearly gave any registered elector of the county the right to make an oral challenge. I am not justifying anybody doing that by stating that, but I think it is important that this be inserted in the record.

Senator SIMON. If my colleague would yield.

Senator DECONCINI. I would be glad to yield.

Senator SIMON. As I understand Mr. Brosnahan's testimony, it is also illegal to just preemptorily pick out people and challenge them on any basis without——

Senator DeConcini. And I would dispute that, just based on the grounds here. It says any person offering to vote may be orally challenged by any registered elector in the county upon any of the following grounds.

It does not make it right, in my judgment.

Mr. Brosnahan. If I could comment, because what I am giving you is the benefit of my state of mind as to that particular statute. I thought at the time, and I still think listening to the statute being read, that it does not authorize anybody from either party to challenge based on any one of those, pick it out and challenge a large percentage—say 75 percent of all the people who show up to vote. I do not think that that is authorized by that statute, but that is just my view.

Senator Biden. If the Senator would yield, in the State of Delaware and other States that have similar legislation, unfortunately, in its history, the standard, as best I understood, was as has been stated by the witness. And if I could make an analogy, it is illegal to carry a concealed and deadly weapon. It is not legal to walk up without reason to believe they are carrying one and challenge whether or not they are in possession of one.

Senator Metzenbaum. I might point out to both the Senator from Delaware and the Senator from Arizona, nobody is making an issue about the legality of Justice Rehnquist's actions. That is not the major issue.

If I just may finish my sentence. The issue is the Justice has said to us that he did not challenge and he told us that again 2 days ago. So the issue is whether or not he has represented the facts to us. I do not think there is any question under the law of your State that challenges could be made under the law and could be made probably under the law of mine. That is not the issue.

Senator DeConcini. Well, I just would say, Mr. Chairman——

The Chairman. The distinguished Senator from Arizona, do you have anything else, Senator?

Senator DeConcini. Yes, Mr. Chairman. I was just making a response to the Senator that that is an issue. Also as an issue is what is a challenge. Being present there talking to the judge of the election board? Is that a challenge? Going up to the person and asking him to read something? That obviously is a challenge under the statute I just read at the time. So there is a question.

Senator Metzenbaum. Well, if it walks like a duck and talks like a duck and quacks like a duck, then I suppose it is a challenge.

Senator DeConcini. Well, I suppose if the Senator is predisposed to the conclusion that a legal representative of the party being in a polling place is a challenge, it is a challenge. I am not satisfied that that is a challenge.

Senator Metzenbaum. Well, I guess my point about it is it is the reaction of the people. The people were afraid. They were walking out of the booths. They were calling officials to come in to protect them. They felt they were being challenged. That is my point about if it appears to be something and people are reacting to it in that manner, then you do not need to have a law book definition. The fact is it obtained the results.

Senator DECONCINI. If the Senator would yield then, in that case, if the people in this audience say that you have brown hair, then you must have brown hair, right?

Senator METZENBAUM. I do not think that is quite possible.

Senator DECONCINI. At least he has hair. I do not have any. [Laughter.]

Senator BIDEN. May I clarify a point?

The CHAIRMAN. Let us move on now.

Senator BIDEN. At least this is important to make, because I think that I am not certain about whether or not Justice Rehnquist's testimony is in absolute opposition to the testimony stated here, and I think Senator DeConcini may have put his finger on something. I want to make sure we understand what we mean by challenge.

If in fact Justice Rehnquist meant by challenge that he—I would like you to respond to this, if you know, Mr. Brosnahan. I know you would not if you do not know. But if I as a Republican challenger have a doubt about whether or not a person about to vote is qualified to vote, and I can legitimately challenge, under the law do I turn to the elected official who is there?

What was the title of that official?

Senator DECONCINI. They call him the judge.

Senator BIDEN. The judge. To the judge that is there, and do I say, "Judge, I ask you to challenge John Doe"?

Mr. BROSNAHAN. That is my understanding why the judge was there was, among other things, to deal with any disputes, and that in some of the precincts that was not what was happening.

Senator BIDEN. The last comment, Mr Chairman. Justice Rehnquist indicated in response to me and others that he did not challenge anyone. We may very well have to ask Justice Rehnquist back here to define what he meant by challenge because if he is playing a technical game here saying, well, I did not personally challenge; I turned to the judge and asked the judge to challenge, then I would like to give him a chance to clarify that.

So I respectfully suggest we should not foreclose the option that we may have to have Justice Rehnquist back here.

The CHAIRMAN. We have released him now. We kept him here for 3 days. Full opportunity was given to ask all questions they wanted to.

Senator BIDEN. Mr. Chairman.

The CHAIRMAN. Incidentally, your side was to have 4 hours this morning. They have taken—we started at 8. They have taken 6 hours already.

Senator BIDEN. Mr. Chairman, I think that is accurate. Obviously there is no side here. The side is whether or not Justice Rehnquist has an opportunity to clarify what, in fact, appears to be conflicting testimony from a witness whose credibility is unimpeachable. That is the question. If he chooses not to do that——

The CHAIRMAN. I will offer him that opportunity, if that is what you want to do.

Senator BIDEN. That is all I am saying.

The CHAIRMAN. I will offer him the opportunity if he wants to come back. I thought it was pretty clear that he had finished.

The distinguished Senator from Alabama. We want to move on.

Senator HEFLIN. Mr. Chairman, at the end, I may have been the only Democrat here. I believe Senator Simon did finish. But I did make the statement that we reserve the right for him because he might want to return, and there might be other reasons. There was a reservation, I think, and it was as left. He was not excused. It was left with no contest to my reservation that if it was desirable, he could be returned.

The CHAIRMAN. I dismissed him, but I told him we would give him an opportunity to come back if he wanted to, and we will afford that opportunity to him if he cares to come back.

Senator HEFLIN. I think the record will speak for itself on that.

The CHAIRMAN. That is right. It is res ipso locitur, speaks for itself.

The distinguished Senator from Utah.

Senator HATCH. The Arizona statute stated that at each voting place one challenger for each political party may be present. The Arizona Republic indicated that Bethune is where there was an incident and that you and somebody else went to Bethune.

Mr. BROSNAHAN. Not that it was the only incident, though.

Senator HATCH. No; that is right

Mr. BROSNAHAN. Right.

Senator HATCH. You went there with the FBI. It should interest you to know that there is only one FBI report from any incidents that day. And that happens to be at Bethune. That is the only incident reported in the press. So it is pretty clear that that is where it was.

I might add there is nothing in the FBI report mentioning Rehnquist.

Mr. BROSNAHAN. Does the FBI report say that I went to a precinct? Do you have, a report? If I may ask, I do not know what your rules are. Mr. Chairman, I do not know if this is in order, but does the FBI report, Senator, that you have, say that James J. Brosnahan, assistant U.S. attorney, accompanied by an FBI agent went to a precinct and there there were some interviews and here are the interviews and here are the people that are involved? Does it say that?

Senator HATCH. I do not know if your name is mentioned or not.

Senator BIDEN. I did not hear the response.

Senator HATCH. I said I do not know whether his name is mentioned or not. I am not sure it is. The July 25, 1986, Washington Post states:

> Brosnahan, however, said there were enough complaints about the GOP challenges at the Bethune precinct in 1962 that he went there with an FBI agent to investigate. Brosnahan said he found a small group of Republicans including Rehnquist there challenging voters on a random basis, asking Hispanic voters if they could read English and black voters if they could read at all. They would do this right in line rather than getting a person off to the side Brosnahan said, telling one person after another you cannot read is an aggressive thing to do.

You are quoted as saying:

> My best recollection is that he, Rehnquist, was challenging voters Brosnahan said. But that was 1962 and this is 1986. I know he has denied that, but I have asked myself in fairness what can I remember.

Let us be fair here. The police made a report on the disturbances that you investigated for 15 minutes. Mr. Chairman, I will ask that it be placed in the record.

Mr. **Brosnahan**. All the police reports?

Senator **Hatch**. At least the one at the Bethune school.

Mr. **Brosnahan**. No; that is not what I said.

Senator **Hatch**. All that any of them have is the Bethune school. That was the only disturbance that occurred that day.

Mr. **Brosnahan**. I want to be fair but that is not what I said.

Senator **Hatch**. You said 15 or 20 minutes.

Mr. **Brosnahan**. No; I did not say what you just said.

The **Chairman**. Counsel, we will give you a chance in a minute. He has the floor now.

Senator **Hatch**. What did I say that was wrong? I said the police made a report on the disturbances that you investigated for 15 or 20 minutes.

Mr. **Brosnahan**. You said you had a police report involving an incident at the Bethune school, and that was the one that I told you about, and that is not what I told you about.

Am I right?

Senator **Hatch**. It is the only place where anybody recalls an incident occurring.

Mr. **Brosnahan**. Am I right?

Senator **Hatch**. No; you are not right.

Senator **Biden**. The witness——

The **Chairman**. Senator, you have to keep quiet. We can only take one at a time. I will give everybody a chance.

Senator **Hatch**. You have said that you do not know where it was. A lot of evidence indicates where this incident occurred.

Mr. **Brosnahan**. No; I have said more than that. With the chairman's permission, I am not sure about your procedures.

Senator **Hatch**. You said a lot of things. I am going to go into them.

Mr. **Brosnahan**. Here is what I said, Senator. On that day, there were a number of complaints from different precincts so that the concept which I think is implicit in your question which was that you hold the report that must deal with the same incident is not correct and it is not even close to being correct, and it does not fairly state my testimony.

I have come to be fair to all the people concerned and particularly a Justice of the U.S. Supreme Court, but I have told you rather directly what my recollection is, and what you just said about that report is not correct.

Senator **Hatch**. Let me stand corrected and say again that the FBI report reports the only incident. The only incident they have at that time was at Bethune school. The Arizona Republic agrees. You said that in the Washington Post.

Mr. **Brosnahan**. Well, the Arizona Republic does not say it is the only incident.

Senator **Hatch**. Are you saying the Washington Post is wrong? "Brosnahan said, however there were enough complaints of GOP challengers at the Bethune precinct in 1962"——

Mr. **Brosnahan**. The Arizona Republic does not say that was the only incident, and it was not the only incident.

Senator HATCH. Are you denying what you said in the Washington Post that it was the Bethune school in 1962?

Mr. BROSNAHAN. What I have told you——

Senator HATCH. Do you go by what is said here or do you not?

Senator METZENBAUM. Let him finish.

Senator HATCH. I want an answer to my question.

The CHAIRMAN. I will decide it.

Senator HATCH. I will let him answer.

Senator METZENBAUM. I understand you will decide it.

The CHAIRMAN. Well, keep quiet then. He has the floor.

Senator HATCH. Have him answer my question.

The CHAIRMAN. I will decide.

Senator METZENBAUM. Let him answer.

Senator HATCH. Is this a true statement, Mr. Brosnahan? Did you make it or did you not make it to the Washington Post? You have not said it here today. Is the Washington Post right?

Mr. BROSNAHAN. Are you going to let me answer?

Senator HATCH. Yes.

Mr. BROSNAHAN. Because I would like to.

Senator HATCH. I would like to get an answer to that question.

Mr. BROSNAHAN. I would like to answer, and if you are finished your question to me——

Senator HATCH. I am finished.

Mr. BROSNAHAN. I want to be respectful and responsive.

Senator HATCH. And I will try to be the same.

The CHAIRMAN. And you have a right to answer. Go ahead and answer it.

Mr. BROSNAHAN. My answer is that I have told you four times that I am not sure which polling place it was, and that is my testimony and that is accurate testimony.

Senator HATCH. All the evidence points that it is Bethune. You said in the Washington Post that that is where it was. That is all I am saying. You can say that you are not sure today. That is fair. That is what you have said.

I am saying everything else says that is where it had to be.

Mr. BROSNAHAN. You are saying that that is where it has to be, even though I have given you my testimony.

Senator HATCH. I am saying that is what the evidence shows. That is what the FBI report shows. It was the only report made by the FBI. You are aware that they make reports of everything they investigate. The logical conclusion is that is where it occurred.

Mr. BROSNAHAN. I know that the FBI gets——

Senator HATCH. The Arizona Republic article says that is where you were. I am sorry to interrupt you.

Mr. BROSNAHAN. Mr. Chairman, if I may, I do not want to take your time. You have other witnesses here. I know the FBI has a destruction schedule. I know this just from my practice of 5 years, which they instituted in 1970. I know nothing that would please me more that we would find the FBI report that would reflect what the FBI agent who accompanied me to that precinct said and did, and I also know that what you probably have is one of the reports covering everything that happened in 1962.

Senator HATCH. We have searched it thoroughly, and they did not destroy this report. It is the only report that there is. I understand that you do not want to put yourself at the Bethune school. I am just saying that everything else seems to put you there

Mr. BROSNAHAN. No; that is not the way I would put it.

Senator HATCH. Let me go further. The police made a report on the disturbances at Bethune school. I am going to put a copy of that police report in the record.

Senator HATCH. It mentions there was a great deal of unrest there including a fist fight. It mentions Wayne Benson. It mentions reports from Mrs. Bass, Mr. Marino, Mr. Delice and others. It never mentioned Mr. Rehnquist. He was the legal adviser.

Any fair reconstruction of the incident is that Rehnquist was the legal adviser to the Republican Party. He showed up to settle the same dispute. Evidently the police had already arrived and they had taken Mr. Benson, the challenger, the only one who could have had the credentials there that day, who created the disturbance.

There is no question that he was part of that disturbance. Mr. Rehnnquist was probably the only one left because he had done nothing wrong. We will put that in the record. The thing that troubles me is that a National Public Radio broadcast of July 25, quotes you as saying that you never saw Rehnquist do anything personally.

In your account of 1986, you said you have, "no accurate recollection of Rehnquist actually challenging voters." In the Los Angeles times, July 29, you stated, "I cannot recall any specific action I saw Rehnquist take personally."

Mr. BROSNAHAN. That is exactly what I have been saying for 3 hours.

Senator HATCH. That is right. In an AP story, you stated that, "I cannot say I saw anything specifically that he did."

Mr. BROSNAHAN. That is exactly what I have said during my testimony.

Senator HATCH. Then you state in the National Institute article that you saw Rehnquist challenging voters. They quoted you as an eyewitness, saying "that Rehnquist himself engaged in voter challenges."

Mr. BROSNAHAN. And I have explained to you that that is based on the complaints of the people in line and on my discussion with then Bill Rehnquist on that day. I have explained that to you.

Senator HATCH. You are saying he admitted to you he challenged?

Mr. BROSNAHAN. Yes. I have explained that to you

Senator HATCH. Why did you not say that in these articles?

Senator BIDEN. He has.

Senator HATCH. I do not think he has.

The CHAIRMAN. Senator, you have to keep quiet. Senator Hatch has the floor.

Senator HATCH. He can interrupt.

The CHAIRMAN. I will give you time.

Senator HATCH. Maybe you are not aware that Mr. Rehnquist was the legal adviser for the Republican Party. You know Judge Ralph Hardy.

Mr. BROSNAHAN. Yes.

Senator HATCH. He was the adviser for the Democratic Party at that time.

Mr. **Brosnahan**. He was active. I do not know what his capacity was or what his title was.

Senator **Hatch**. He was the adviser.

Mr. **Brosnahan**. I think he was county chairman one of the witnesses indicated. I think that is right.

Senator **Hatch**. Judge Hardy's letter states that the incident at the Bethune precinct which Mr. Tate and Mr. Harris allege took place in 1964 did, in fact, occur in 1962. He worked rather closely with Mr. Rehnquist.

Judge Hardy is unequivocal about Mr. Rehnquist's noninvolvement in such an incident. I am reading from the committee report at that time. Judge Hardy makes the following statements in his letter to the committee.

> I never observed Mr. Rehnquist attempting to challenge voters at any polling place. I understand that there was testimony, that he had challenged voters at Bethune and Grenada precincts. I can state unequivocally that Mr. Rehnquist did not act as a challenger at the Bethune precinct because of the disruptive tactics of the Republican challenger at that precinct. I had occasion to be there on several occasions. The same Republican challenger was there continuously from the time that the polls opened at 6 a.m. until about 4 in the afternoon.
>
> About that time after a scuffle he was arrested or removed from the polling place by sheriff's deputies. Thereafter there was no Republican challenger at Bethune, and that challenger's name was Wayne Benson.

It is pretty apparent that a lot of those people had him mixed up. He was 6 feet, 2, about 220 pounds.

Mr. **Brosnahan**. I did not get him mixed up.

Senator **Hatch**. Mr. Rehnquist is 6 feet 2, about 195 pounds.

Mr. **Brosnahan**. No, Senator; I did not get Bill Rehnquist mixed up with a gentleman named Benson any more than I got John O'Connor, the husband of the present Justice on the Supreme Court, mixed up with anybody else. I know him, and I did not get mixed up about Bill Rehnquist. I knew him then. I could spot him now, and there is no question about that.

Senator **Hatch**. You say one thing and Mr. Justice Rehnquist says another. This occurred before his first nomination proceeding occurred in 1971.

Mr. Hardy, who was there, who is now a sitting Federal district judge says you are wrong.

Mr. **Brosnahan**. No; he did not say that.

Senator **Hatch**. He says that he does not——

The **Chairman**. You must not interrupt. I will give you time later. You cannot run the meeting and me too.

Mr. **Brosnahan**. You are right.

Senator **Hatch**. If you add up all the facts together, he does. That is my viewpoint. I could be wrong. There is room for dispute here.

Mr. **Brosnahan**. Mr. Chairman.

Senator **Hatch**. You have a Supreme Court Justice who has served 15 years. Nobody brought you forth in 1971 and you did not offer to come. You claim you did not offer to come forth today. You have a Supreme Court Justice who says that your account is not correct. You have a conflict between you and Mr. Justice Rehnquist over an event which occurred almost 25 years ago.

You admit that you never personally observed anything other than he was there.

Mr. **Brosnahan**. No. At no time, Senator——

Senator **Hatch**. You did in these reports.

Mr. **Brosnahan** [continuing]. You can ask anyone in the room, anybody in the room whether I ever said I never observed anything. What I observed was a line of voters, some officials. The line was unhappy and made it clear.

Senator **Hatch**. Yes.

Mr. **Brosnahan**. There was Bill Rehnquist as he was then called. There was an FBI agent. There was a discussion with Bill Rehnquist that I was part of.

Senator **Hatch**. Yes.

Mr. **Brosnahan**. I think it is not accurate. I think it is not fair to suggest that I have said I did not see anything when I saw those events, and I think you have not, in all fairness to you, Mr. Chairman, if I may, you have not correctly characterized my testimony here today.

Senator **Hatch**. After 24 years, after looking at the police report which does not mention Justice Rehnquist, after looking at the only FBI report available from that day, and which was retained by the FBI which does not mention Mr. Justice Rehnquist, after looking at all your statements that you made to the press, including the Post article where you admit—or at least the press says that you talked about the Bethune school, after realizing you could have testified in 1971, after looking at Judge Hardy's statement, and after looking at all the statements that you made, it appears that some of your statements are contradictory. Whether they are or not will have to be judged by others. In all of those interviews you never said that you had personally chatted with Mr. Justice Rehnquist and he admitted that he was a challenger that day.

Today is the first time that we have ever heard that.

Mr. **Brosnahan**. No; that is not correct.

Senator **Hatch**. It is not?

Mr. **Brosnahan**. And——

Senator **Hatch**. Are you saying that you did not talk to these reporters?

Mr. **Brosnahan**. Since 1962 I have known that I talked with Bill Rehnquist at the site of a polling place——

Senator **Hatch**. Did you?

Mr. **Brosnahan**. If I may finish.

Senator **Hatch**. Yes.

Mr. **Brosnahan**. If you do not mind.

Senator **Hatch**. Yes.

Mr. **Brosnahan** [continuing]. In Phoenix.

Senator **Hatch**. I would love to hear your answer.

Mr. **Brosnahan**. I have known that. In fact, one or two members of my family have known that.

Senator **Hatch**. Why are they not here?

Mr. **Brosnahan**. Excuse me. Senator, if you do not want me to testify.

The **Chairman**. Go ahead. You have a right to finish. Go ahead and finish.

Mr. **Brosnahan**. Thank you.

Senator **Hatch**. I apologize.

Mr. BROSNAHAN. OK. I have explained to you that Bill Rehnquist was interviewed by myself and as I recall it, by an FBI agent. There was certainly an agent there, and I think he talked to Bill Rehnquist.

I have explained to you that there was a line of voters there, that we were told that Bill Rehnquist was serving as a challenger. He did not contest it, and there was some level of complaint about his conduct.

I have told you all of those things.

Senator HATCH. That you have said.

Mr. BROSNAHAN. And do you think that I really would be here in front of the Judiciary Committee of the U.S. Senate to testify on the qualifications of the Chief Justice after 27 years of trying lawsuits if I was not absolutely sure that I interviewed Bill Rehnquist because voters pointed him out?

Do you think, Senator, I would do that because I assure you——

Senator HATCH. Yes; I do.

Mr. BROSNAHAN. I assure you that if it was even close——

The CHAIRMAN. Senator, let him get through.

Mr. BROSNAHAN. If it was even close, I would be home having my Friday afternoon lunch at Jack's and I would not be here in front of you. I am telling you my recollection. [Applause.]

The CHAIRMAN. Let us get quiet.

Senator HATCH. Let me ask you a question.

The CHAIRMAN. I am going to ask the police to come up and remove anybody that claps in here. This is not a place for such conduct.

Senator HATCH. In any of these interviews——

The CHAIRMAN. I wish guards would watch anybody that does any clapping and take them out.

Senator HATCH. In any of these interviews with various media sources throughout the country, have you told them what you told us here today? Is this the story that you gave them? And if not, why not?

Mr. BROSNAHAN. Excuse me. If not, why not? Is that what you said?

Senator HATCH. Have you told them what you have told us here today?

Mr. BROSNAHAN. Yes; if I may answer your questions, in those interviews that I have given I have been very careful to express to them my best recollection of the events as I recall them. They have been pretty good I must say about recounting what I have said basically those that I read. Some of them I have not read.

Here or there, there may be something that I do not agree with, but by and large, they have been accurate as to what I have told them. When I responded because of this committee or the Democrats of this committee wanted me to come here and testify, I was particularly conscious of trying to be accurate and trying to say to people what I know and not go beyond it, even though some reporters might ask you a question that might lead you down somewhere where you do not have a good recollection.

Senator HATCH. In all of these media sources, not one of them gives as full an account as you claim to be true today.

Mr. **Brosnahan**. I do not agree with your characterization. I do not think, if I may say so in my own defense, Mr. Chairman, I do not think that it is fair to characterize it that way, because I think you will find that I have been pretty faithful to my recollection.

Senator **DeConcini**. Would the Senator from Utah yield?

Senator **Hatch**. I would be happy to yield to the distinguished Senator from Arizona.

The **Chairman**. The distinguished Senator from Arizona.

Senator **DeConcini**. I think it is important, Senator Hatch, to note that in one report that I am looking at here that was taken in early from Mr. Brosnahan, it says, and I will just quote it:

> Brosnahan was told by a person or persons unknown that Rehnquist was challenging, and in conversations with Brosnahan, Rehnquist stated to Brosnahan that Rehnquist was a challenger.

So it is in one report, not just today that it was up. I just think it is fair for the record.

Senator **Metzenbaum**. Mr. Chairman.

The **Chairman**. Any more questions of this gentleman?

Senator **Biden**. Mr. Chairman, yes, I do.

The **Chairman**. Well, are you through?

Senator **Hatch**. I'm finished.

The **Chairman**. I thought we were through with these witnesses.

Senator **Biden**. I thought so, too, but we keep seeing new information brought up. Mr. Chairman, I am disturbed not by the testimony because I have tried to be as fair and precise and as pointed as I can with this witness to test his credibility.

I do want to say for the record, and I apologize for having interrupted Senator Hatch, that to talk of the Bethune School and the FBI report as if it somewhat, even indirectly, contradicts the testimony of the witness is the ultimate non sequitur.

They have no relationship to one another nor has the witness, because I questioned him pointedly on that in the beginning, No. 1. No. 2, never has the witness said today that he personally saw Justice Rehnquist challenge a voter. He has never even implied that.

He has said what he said over and over again that he spoke to individuals in the line who said that Justice Rehnquist challenged the voter. The third point I would like to make is Judge Hardy's testimony or statement in no way, shape or form contradicts the issue at hand, the statement of the witness.

It does speak to the Bethune School incident. That is unrelated, according to the witness's testimony. Now, I am really very, very concerned. I would suggest that we consider going back and finding out, ask the FBI to tell us, who were the FBI agents at the time in Phoenix in fairness to Justice Rehnquist, who were those FBI agents and we should, if they are living, subpoena all of those FBI agents to come here and testify as to whether or not the statement being made by the witness is accurate or whether or not the statement made by Justice Rehnquist is accurate.

Here we have an ability to resolve from the lips of an FBI agent under oath, assuming he or she is still alive, who is telling the truth, and I want to know.

Mr. **Brosnahan**. It was a he. I will tell you that. [Laughter.]

The **Chairman**. Let us get quiet.

Now, are we through? We have other witnesses here.

Senator **Metzenbaum**. Mr. Chairman, I am not going to ask any other questions.

The **Chairman**. Senator Metzenbaum.

Senator **Metzenbaum**. Mr. Chairman, our colleague from Utah seemed to indicate that there was a statement of Mr. Hardy's that somehow related to Mr. Brosnahan, and therefore, since I have that statement in front of me, and Mr. Brosnahan's name is not even mentioned in the statement——

Senator **Hatch**. I did not say that, Senator. I said are you aware that Mr. Hardy was intimately involved with this incident at this time. He was the leader of the Democrats. He was the co-equal of Bill Rehnquist for the Republicans. He said there was absolutely nothing wrong.

Senator **Metzenbaum**. Did he not also say that he has heard that Rehnquist was a participant in the Bethune precinct incident, and does he not say that he said he cannot say whether Rehnquist was there or not but he did not see Rehnquist at the time of his visit to the Bethune poll in Phoenix, and that he indicates that he does not know whether Rehnquist was there or not, but you would seem to suggest that he was making the point that he was not there.

The **Chairman**. All right. Let us move on.

Senator **Leahy**. Mr. Chairman, I have a couple of questions.

Senator **Hatch**. Excuse me, on that point. Let me just answer that.

The **Chairman**. We are not going to carry this hearing on forever.

Senator **Hatch**. I understand.

The **Chairman**. This side agreed to 4 hours today, and we agreed to take only 2, and this side has already had 6½ hours. Now, we are going to move on. Do you have anything, Senator?

Senator **Leahy**. I have questions that will take about 3 minutes. As the chairman knows in most of the questions I have asked of any witnesses I have yielded back most of my time. So if he has some extra time, it is because of me.

The **Chairman**. Proceed for 3 minutes then.

Senator **Leahy**. Or whatever. Mr. Brosnahan. You said Mr. Rehnquist was a challenger. Was that based on what he said to you?

Mr. **Brosnahan**. I think in part it was, and it was based on the statements of others that he had been a challenger and then in an interview with him that proceeded on that basis and his response as to why what he was doing he thought was all right.

Senator **Leahy**. Now, did the voters tell you what it was Mr. Rehnquist did when he challenged them?

Mr. **Brosnahan**. Yes; I am sure they did.

Senator **Leahy**. What did they tell you?

Mr. **Brosnahan**. That is the point at which I am concerned that if I am specific about it I could be unfair in either direction. The level of my memory is such that there were complaints about his conduct, and then he responded to those by giving his side of that story, whatever that was.

If I go beyond that, my concern is that I will mix together frankly complaints that had to do with other people in other precincts on that day, and I am concerned about doing that, and I do not want to do it.

Senator LEAHY. I understand, and I commend you on your efforts to be totally fair, and I think it should be noted and I watched or listened to almost all your testimony and I think you bent over backward to be totally fair and objective in this.

Mr. BROSNAHAN. Thank you.

Senator LEAHY. And I compliment you for doing what is really a public service and something a lot of people would not do.

Did you speak to Mr Rehnquist about the statements people had made to you about the nature of his challenges?

Mr. BROSNAHAN. I did.

Senator LEAHY. Did he, in any way, indicate that he would do different as a result of his conversation with you?

Mr. BROSNAHAN. There could well have been an element of that in the discussion in the sense that when we withdrew, my sense of it was that the situation was calmed down. So there could have been an element of him without—I am not saying he admitted anything about the exact nature of his conduct, but the idea was that it was going to be peaceful after we left, and I have that distinct impression that when we left it, I thought we a peaceful situation.

Senator LEAHY. As compared to the situation when you arrived?

Mr. BROSNAHAN. When we arrived, it was a tense kind of a situation.

Senator LEAHY. Is it your recollection that there was a modification of whatever he was doing as a result of your conversation with him?

Mr. BROSNAHAN. I would say that is a fair comment, based on the complaints.

Senator LEAHY. Did you and Mr. Rehnquist ever have a discussion about this incident afterward?

Mr. BROSNAHAN. No; and I have seen him about four or five times. The last time was last spring at the Judicial Conference in Tucson. I came around the corner and he was seated there and I stopped and chatted with him. I have never talked with him about it. I have probably seen him four or five times.

One of those times was when I argued in the Supreme Court and he, of course, was there, but he was sitting up front. There was no opportunity. We have never discussed it since.

Senator LEAHY. It was not a comfortable situation like here, is that what you are saying? [Laughter.]

Mr. BROSNAHAN. No; it was not, because they told me my time was up and made me go away.

Senator LEAHY. That sometimes happens to members in this committee, too, so do not feel bad.

Mr. BROSNAHAN. I have never discussed this with him after November 1962.

Senator LEAHY. Thank you.

Thank You, Mr. Chairman.

The CHAIRMAN. I think the record, affidavits and everything speaks for itself. The matter of interpreting them, well, that is another question. People interpret them in different ways, but the record speaks for itself, and that is what we will go by.

Now, we want to thank all you gentlemen for coming.

Senator HATCH. This is the second witness.

The CHAIRMAN. I was out. I was under the impression that all spoke.

Mr. Mirkin.

Senator BIDEN. I think we agreed to go to Mr.——

The CHAIRMAN. Well, I will call the arrangement.

Senator BIDEN. When you were out. I am sorry, Mr. Chairman. When you were out.

The CHAIRMAN. It does not make any difference to me, though.

Senator BIDEN. Well, let us go to Mr. Smith then.

The CHAIRMAN. I am just going to go down the line.

Mr. Mirkin, do you have a statement?

STATEMENT OF MELVIN J. MERKIN

Mr. MIRKIN. Yes, sir; a brief one, sir. First, I would like to say I would rather be at Jack's, too, but here I am.

I am Melvin J. Mirkin. I am a native of Arizona. I went to Stanford Law School a couple of years after Mr. Rehnquist. I did not know him there. I got to know him in Phoenix through alumni affairs, and I never knew him well, but pass on the street, "Hello, how are you," things like that.

I became familiar with his political positions during this time in the early to middle 1950's. I thought they were somewhat quaint, and I tried to figure out what he was and I finally determined he must be a Jeffersonian loyalist or something like that.

In the sixties, he led a group of Republicans whose program was, I felt, to inhibit people from voting Democratic. And if he knew that a person or his people, his group knew that a person would vote Republican, they would never have challenged them.

But they did not know that, so they went to where most of the Democrats were, to precincts that had 85, 90, 95 percent Democrats, and they set up their so-called flying squads of challengers. This was either in 1960 or 1962. I was asked to be at a precinct for the Democrats, I do not remember whether I was there when the polls opened or whether I responded to a call.

But I went to one on the south side of Phoenix. And Mr. Rehnquist was there with a couple of other people. And he told them in an audible voice that it was their task to stay at this poll and to see that no persons who were improperly registered were permitted to vote. And that extended to challenging for being illiterates.

I did not feel that he was really talking to the people who he was putting in position but, instead, he was letting the crowd that was there know what the drill was going to be. And some of the people peeled off at that time.

I then spoke ostensibly to him, but I was not speaking to him either. I was trying to comfort those who were peeling off and those who were worrying about whether they should remain or not.

And I told Mr. Rehnquist and his people that they better not harass voters. If they did, I would call the Sheriff of Maricopia County, and he was not a Republican and he would not take much sympathy with what they were doing. Again, I say I was speaking to the crowd and not really to him.

I also said that if they wanted to slow down the vote, we could do the same thing in the Phoenix Country Club precinct, and I am sure we could find as many illiterates there as they were able to find where we were. [Laughter.]

The CHAIRMAN. You have to keep quiet. I wish the policeman would see who it is misbehaving, laughing, clapping, and remove them from the room.

We are going to have order.

You may proceed.

Mr. MIRKIN. Thank you, sir.

This became an anecdote that I used to tell regularly about—not particularly about Rehnquist, but just about something that happened during this period.

When Mr. Rehnquist became a Justice of the Supreme Court, it became a more interesting anecdote, and I probably gave him a much more prominent spot than I had before because, previous to that, I was the star of the story.

I have always considered Mr. Rehnquist an honorable man, and I still do. And I do not feature myself being here in opposition to his appointment but just to answer any questions that may be asked me about that or any other incident.

Thank you.

The CHAIRMAN. Mr. Mirkin, I believe Justice Rehnquist was confirmed in 1971.

Did you come forward then?

Mr. MIRKIN. Oh, no. No, I did not come forward this time either, sir. I was asked. I do not volunteer.

The CHAIRMAN. Where did you live in 1971?

Mr. MIRKIN. 1971, I may have been in Malaysia or Princeton, NJ, one of the two places. [Laughter].

The CHAIRMAN. Could you have lived in northern Virginia?

Mr. MIRKIN. I lived in northern Virginia too, I think——

The CHAIRMAN. Do you not know where you lived in 1971?

Mr. MIRKIN. I am not sure, sir. I was moving around quite a bit at the time. I think——

The CHAIRMAN. No other questions.

The distinguished ranking member.

Senator BIDEN. Thank you very much.

Were you a Democrat at the time of this incident?

Mr. MIRKIN. Yes, sir, I was.

Senator BIDEN. Were you active in the Democratic Party?

Mr. MIRKIN. Yes, sir.

Senator BIDEN. Were you expecting, whether from Mr. Rehnquist or anyone else, the kind of challenging that you spoke to today?

Mr. MIRKIN. Yes. I think that is why a great number of us were amassed to try to cover that.

Senator BIDEN. Well, did anyone else with you that you can identify at the time, did anyone besides you and Mr. Rehnquist, another attorney, an election official, anyone else that you could name at this time who was there at the time to witness the exchange as you have testified to between you and Mr. Rehnquist?

Mr. MIRKIN. I cannot remember.

Senator BIDEN. Was the exchange that you had with Mr. Rehnquist one that can be characterized as him instructing the Republican challenger or challengers?

Mr. MIRKIN. As I remember, challengers, plural, sir.

Senator BIDEN. And can you give us an estimate based on your recollection of how many people were waiting in line? Was it 2, 10, 20? Just rough estimate. Just for me to get a sense of what we are talking about.

Mr. MIRKIN. I would think 10 to 20.

Senator BIDEN. And Mr. Rehnquist, how did you characterize the tone of his voice, the level of his voice as he was giving instructions to the Republican challengers?

Mr. MIRKIN. Well, Mr. Rehnquist is not a strident man. He spoke in audible tones.

Senator BIDEN. How then do you make the determination that his audible tones were directed at the people in line and not merely the challengers to whom he was speaking?

Mr. MIRKIN. Well, I do not think he would have brought two people to the polls who had no idea of what they were going to do and then have to instruct them at the time. I thought this was purely for public consumption.

Senator BIDEN. Did he instruct them standing next to the line, off in a corner, outside? I am trying to get a picture.

Mr. MIRKIN. As I remember, this was not that big a place. I do not know where he was standing. Everybody knew who these people were. They were Republicans that were going to do something, probably something not good.

Senator BIDEN. In Delaware, the polling places are usually schools, sometimes they are in cafeterias as big as this room; sometimes the table is like where you are standing, sitting where the challengers sit and the voting judges sit, and the booth is off to the right, and there is a great open space behind. And it is a large place.

And so if Justice Rehnquist walked in, walked behind the table and was standing off to the right speaking in audible tones to the challengers, that is one thing.

If Justice Rehnquist was standing in front of the table, positioned in a way to turn to the challengers and telling them in audible tones what you say he said, facing the people in the line, that is another thing.

So I am trying to get a sense of whether or not Justice Rehnquist's instruction to the mere fact that he instructed two people who were challengers, I admit it is unusual he would wait until they got to the precinct, notwithstanding the fact they all three came in together, but notwithstanding that, it to me has some impact on your recollection as to the circumstances, the physical circumstances under which the instructions took place.

Mr. MIRKIN. I am sorry, I do not think I can help you. I know it was not a large room. I know it was a room in which normal conversation could be heard from one end to the other.

Senator BIDEN. I thank you very much.

I have no further questions.

The CHAIRMAN. Senator Mathias, you just came in. You said you want to ask one question of Mr. Brosnahan and then we will proceed.

Senator MATHIAS. I have a couple of questions for Mr. Mirkin.

The CHAIRMAN. Mr. Mirkin? OK.

Senator MATHIAS. Mr. Mirkin, was there an official status for a challenger at that time?

Mr. MIRKIN. It is my recollection that there was. And I heard you previously ask whether this was a descriptive term or whether challenger was the title, but challenging was the descriptive term? I think it has become confused.

Senator MATHIAS. Well, it did become a little confused. I just wondered whether there was any record kept.

The Maryland practice may not be similar to the Arizona practice, but we usually have in each party a county chairman or similar official who authorizes certain poll watchers and challengers. Those were the two titles, poll watchers and challengers. And it becomes a matter of just a simple fact, whether you are appointed as a challenger.

What kind of challenging you do may be something else, but I think it would be interesting to determine, No. 1, if Justice Rehnquist was an official challenger? It is a perfectly respectable thing to be. In fact, it is an important thing in any political organization.

But then, secondly, we must determine what he did as a challenger. Did he actually carry out that function and in what manner did he carry it out?

Mr. MIRKIN. From what I saw, it was not my opinion that he was an official challenger. He was dealing with people who he wanted us to believe were official challengers, but I do not know that they were official challengers as you have characterized to me. And I never saw Mr. Rehnquist challenge.

Senator MATHIAS. You never saw him address anyone in that voting line?

Mr. MIRKIN. No, sir.

He talked to his people. He was easily overheard talking.

Senator MATHIAS. And he was instructing them on what they should do?

Mr. MIRKIN. That is correct.

Senator MATHIAS. What they should do as challengers?

Mr. MIRKIN. As something or other, that they were to see that people who were not entitled to vote, properly entitled to vote, should not vote.

Senator MATHIAS. Are you implying that it was some kind of a vigilante spirit with which he was talking, or was he talking as an official of his party?

Mr. MIRKIN. I am not implying at all that he was a vigilante. I concluded that the purpose of this entire exercise was to convince those who were waiting in line, and those to whom they would speak after they left, that there may be some problems in voting, that you may be subjected to challenges and tests. And this had a negative effect upon them.

Senator MATHIAS. Would you go so far as to say it was an attempt to chill the atmosphere?

Mr. MIRKIN. That would be my conclusion. Others might conclude otherwise.

Senator MATHIAS. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Is it your view that Mr. Rehnquist was giving instructions to the Republican poll watchers in a voice that was unnecessarily loud?

Mr. MIRKIN. I do not know that it was unnecessarily loud. I know that it was audible. He was not whispering to these people.

It was in a tone and it was in an intensity that could be heard by everyone in the room.

Senator KENNEDY. It was not just a—you did not gather it was just a personal conversation of one person with another, or was it in kind of a context in which you would gather that it was either a demand or an order or recommendation or suggestion that several members of the group might follow?

Mr. MIRKIN. My conclusion was and is that the people to whom he was ostensibly speaking were merely props, but they were an excuse for saying what was being said, that the real targets were those waiting to vote.

Senator KENNEDY. Why do you think Mr. Rehnquist was doing this?

Mr. MIRKIN. Why was he doing that? Because I think he wanted the Republicans to become a majority party in Arizona.

Senator KENNEDY. Well, let us be somewhat more specific.

As a result of his conversation, his demand of those individuals, what did you assume would result from those kinds of commands?

What were these people going to do? And who were they going to do it to?

Mr. MIRKIN. I assumed that some of them would leave and they would tell their friends and relatives that there were problems at this polling place.

I tried to allay their fears.

Senator KENNEDY. And was there anything significant about the color of these individuals? Was it a mixed group? Was it more of one color than another?

Mr. MIRKIN. I do not remember. I suppose there were mostly Latin people and some blacks, some Anglos, not too many.

Senator KENNEDY. Were there more Anglos, or was it large percent Anglos and a few blacks and a few browns, or was it predominantly brown with some blacks and a few Anglos? I mean just in general. We are not looking for exact percentages, but we would just like to get a flavor of the kind of people.

Mr. MIRKIN. I think it was predominantly Latin.

Senator KENNEDY. I have no further questions.

The CHAIRMAN. Thank you.

The distinguished Senator from Utah.

Senator HATCH. Mr. Mirkin, welcome to the committee.

Let me just focus for a minute on what you actually saw.

As I understand it, you did not see Rehnquist confront any voters personally?

Mr. MIRKIN. No, sir.

Senator HATCH. You did not see him engage in any scuffling or fisticuffs or anything else?

Mr. MIRKIN. No, sir.

Senator HATCH. You did not see him directly challenge any voters himself?

Mr. MIRKIN. No, sir.

Senator HATCH. What you did say is you overheard him talking in a strong voice to various Republican challengers or poll watchers, or whatever they were called. Is that correct?

Mr. MIRKIN. Yes, sir.

Senator HATCH. It was not overly loud, but it was clear?

Mr. MIRKIN. Correct.

Senator HATCH. I notice that you said in a New York Times interview, "Mr. Mirkin also said, however, I know Rehnquist to be an honorable man. I like the man. And if he would say something else happened, I wouldn't contradict him."

Is that correct?

Mr. MIRKIN. What I meant by that was that after 25 years, it's something like Rashomon—I mean we all have our own stories to tell about that great heroic day when the battle was fought, and I would not contradict him in that he believed something other than what I have said happened. I believe what I have said happened.

Senator HATCH. Mr. Rehnquist was addressing his own party's challengers. This was fully consistent with his assignment as legal advisor to his party.

Can you find any inconsistency with that?

Mr. MIRKIN. I do not know what his charge was. But I was not horribly offended by this. In fact, I have always thought it was small potatoes and rather amusing. And I find out now that it is not. It is far more serious.

Senator HATCH. But you have always believed Bill Rehnquist to be an honorable man?

Mr. MIRKIN. I did and I do.

Senator HATCH. That is all.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. No questions.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman.

Mr. Mirkin, thank you for being here today, and I think you have covered quite well. I would just like to clarify for myself.

The report indicates, when you were interviewed, that you confronted Mr. Rehnquist, and the report used the words "you threatened to call the sheriff."

Do you recall what you said to him?

Mr. MIRKIN. I think it was something, "If you guys don't get the hell out of here, I'm gonna call the sheriff, and he's not going to send Republicans."

Senator DECONCINI. He is not going to do what?

Mr. MIRKIN. He is not going to send Republicans.

Senator DECONCINI. And do you recall any response from Mr. Rehnquist?

Mr. MIRKIN. I did not intimidate him.

Senator DECONCINI. Did he say anything back to you?

Mr. MIRKIN. Not that I remember.

Senator DeConcini. Did you call the sheriff?

Mr. Mirkin. No. I would be afraid to do that. He would probably arrest me.

Senator DeConcini. You were afraid to call the sheriff?

Mr. Mirkin. No. I am just kidding.

No, I had no intention of calling the sheriff. As I indicated——

Senator DeConcini. You were bluffing?

Mr. Mirkin. Certainly I was bluffing.

Senator DeConcini. Why were you bluffing?

Mr. Mirkin. Because I thought Rehnquist had muddied these waters. He had made people nervous. I wanted to try to convince those same people that it was safe, that they had a stronger rod than me to rely on.

Senator DeConcini. Do you think you convinced them of that?

Mr. Mirkin. I doubt it, but I tried.

Senator DeConcini. How long did you stay at the polls.

Mr. Mirkin. Probably 10 to 15 minutes.

Senator DeConcini. When you left, was Mr. Rehnquist still there?

Mr. Mirkin. I think we left about the same time.

Senator DeConcini. What brought you to the polls?

Mr. Mirkin. Again I am not quite sure. I either was—it had either been decided that I would start there that morning or I received a call and was told that I had better go there.

Senator DeConcini. When you arrived, Mr. Rehnquist was already there?

Mr. Mirkin. I do not remember whether he was already there or not.

Senator DeConcini. Do you remember a man by the name of Wayne Benson?

Mr. Mirkin. No.

Senator DeConcini. Do you remember anyone else who was there at the polls?

Mr. Mirkin. No.

Senator DeConcini. Were you by yourself from the standpoint of——

Mr. Mirkin. I do not know. I do not remember anybody being with me. We usually went in pairs, but I do not——

Senator DeConcini. Did you drive there?

Mr. Mirkin. I am sure I did.

Senator DeConcini. Do you remember driving yourself?

Mr. Mirkin. No. But——

Senator DeConcini. Now, after you left this polling place—first of all, do you remember what polling place it was for sure?

Mr. Mirkin. No, sir.

Senator DeConcini. After you left this polling place, where did you go?

Mr. Mirkin. I do not know.

Senator DeConcini. Did you go back to the Democratic headquarters or to your office or go to lunch, or did you go to another precinct?

Mr. Mirkin. I probably went to my office. I do not remember going to any other precinct.

Senator DeConcini. Where was your office at that time?

Mr. MIRKIN. My office at that time was—well, I think I was sharing office space with Langerman and Begam also.

Senator DECONCINI. You were practicing law at that time?

Mr. MIRKIN. Yes.

Senator DECONCINI. Based on your involvement in this situation, what would you do if you were going to vote confirmation of Mr. Rehnquist?

Mr. MIRKIN. I would vote——

Senator DECONCINI. You would what?

Mr. MIRKIN. I would vote to confirm him based upon what I know.

Senator DECONCINI. You would vote to confirm him.

Thank you, Mr. Chairman. I have no further questions.

Thank you, Mr. Mirkin, for being here with us.

The CHAIRMAN. The distinguished Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman.

I know there are a number of other witnesses and I have no further questions.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Just very briefly.

In response to the questions of the gentleman from Arizona, you said that they were there to make people nervous and you were there trying to make people feel safe.

So the object was basically intimidation of voters, is that correct?

Mr. MIRKIN. That is what I thought it was.

Senator SIMON. I have no further questions, Mr. Chairman.

The CHAIRMAN. Any other questions over here on this side?

If not, we will move on.

Senator KENNEDY. Mr. Chairman, I just have a brief question.

Mr. Mirkin, during the exchange of Senator Metzenbaum and Justice Rehnquist, he referred to your affidavit, and he inquired of Justice Rehnquist, and if I could just read his response and get your reaction.

> Mr. Mirkin, attorney in Phoenix, told the FBI that he recalled seeing you, Mr. Rehnquist, giving instruction to challengers in a polling place and had voters in line begin to leave as a result. He said he confronted you and told you that people did not want to be embarrassed like that. Is he being untruthful as well?
>
> Justice REHNQUIST. As to the first part, Senator, if he saw, he certainly could have seen me giving instructions to challengers in a polling place. As to the second part, would you read that again?
>
> Senator METZENBAUM. He said he confronted you and told you that people did not want to be embarrassed like that. He also said that voters in line began to leave as a result of your having given instructions to the challengers
>
> Justice REHNQUIST. I have no recollection of that, no.

Now, was Justice Rehnquist wrong?

Mr. MIRKIN. I do not know whether he is wrong about what he remembers or not. I remember something else having happened. And what I remember is what I told you today.

Senator KENNEDY. No further questions.

The CHAIRMAN. Mr. Charles Pine.

Senator METZENBAUM. I just have one more question.

The CHAIRMAN. Go ahead.

Senator METZENBAUM. I have here a statement of Justice Rehnquist in 1971. I just ask you to comment as to whether it might be factual or not.

I have not, either in the general election of 1964 or in any other election at Bethune Precinct or in any other precinct, either myself harassed or intimidated voters, or encouraged or approved the harassment or intimidation of voters by other persons.

Would you agree with that statement?

Mr. MIRKIN. I have already drawn a different conclusion from the same facts.

Senator METZENBAUM. So your answer is that you do not agree with that statement?

Mr. MIRKIN. All I can tell you, sir, is what I would conclude. And I concluded then, and I am still of the opinion, that the conduct resulted in voter intimidation.

Senator METZENBAUM. Thank you.

The CHAIRMAN. Mr. Pine.

STATEMENT OF CHARLES PINE

Mr. PINE. Mr. Chairman, in the interest of time, I have a one-page statement. I would prefer not to read it but I would like to submit it for the record.

Mr. Chairman, I want to say this. I am quite aware of the fact that Justice Rehnquist has denied that he ever challenged or attempted to harass or intimidate qualified voters.

All I can say in response to that is, based on my personal experience, is the Justice obviously is currently suffering from a convenient lapse of memory.

I say that because I saw him in person challenging individuals, and I saw him do it illegally.

In response to Senator Mathias, sir, we do not have wardens, we have inspectors, we have marshals, we have judges, we have clerks. Each party is allowed one certified poll watcher.

The expression "poll watcher" or "poll challenger" in that instance becomes synonymous. Poll challengers can challenge for anything within the parameters of the Arizona statute outlined by Senator DeConcini, my good friend, and they are limited to that. They can also, of course, if they suspect somebody does any voting under a false name or does not give a correct address, challenge. The warden also can challenge.

But Justice Rehnquist, and to me then he was just Mr. Rehnquist, was approaching voters and saying, "Pardon me, are you a qualified voter?" He gave them no explanation. None of his actions was based on any of the reasons in the parameters outlined by Senator DeConcini. I saw him with my own eyes approach a middle-aged gentleman, arbitrarily in the line, say "Pardon me," but in a very firm and authoritative voice, say "Are you a qualified voter?"

I do not know what the gentleman said in response. He had his back to me and he was softspoken. But he started searching his pockets, first his wallet, and I knew what he was doing because in those days—no one has told you this—we gave out a small card, approximately a little larger than a paper match cover, and that was a receipt, in effect. But it was not necessary. It said that you had been registered by John Doe on a given day at a given precinct, and it had your address on it. But it was not considered an official receipt. You did not have to have it on your person to vote.

If you approached the head of the line and your name was on that voting list, you were eligible to vote.

Incidentally, Mr. Rehnquist, who has admitted that he headed up these flying squads—publicly admitted it in Phoenix and was so reported in the Phoenix press—admitted he headed up these flying squads in 1958 and 1960, 1962 and 1964. I saw him in 1964 at Bethune polling place. And the reason I did, I was a volunteer working out of county headquarters, simply handling telephone calls. People were not certain what polling place they should vote at. Perhaps they had moved in the interim.

This lady called me, very hysterical, and she said there are some Republicans threatening, intimidating our voters down at Bethune. I said to a young attorney, let us drive down there and see what is happening.

When we arrived there, he pointed out William Rehnquist to me. And I fairly recognized him. Although I had never met him physically, I had seen, I believe, a photograph of him, either in the newspaper or in the bar directory.

He was pointed out to me, and just a minute after he was pointed out to me, he approached a voter and this incident happened. Incidentally, the gentleman turned away and left the line.

It happened again 2 minutes later, whereupon I stopped the janitor and asked where the nearest phone was, and went to the phone and called Democratic headquarters, and said you had better rush down some of your best attorneys informed about elections laws because a guy named Rehnquist is illegally challenging people. He is intimidating them.

And when I came out from the phone, which was in an adjacent room, the assistant principal's office or something like that, Rehnquist was just leaving with the two members of his party.

Incidentally, that day I drove around to three or four other districts and I found out that he had also made visits there. But I cannot tell you whether or not he was intimidating voters.

But I want to point this out. I found the Democratic certified, the authorized precinct watcher, and I said will you show me your Republican counterpart? And he pointed to an Anglo, a lady, I believe, but I could be mistaken, but it was not Mr. Rehnquist. So Mr. Rehnquist was not the official challenger for Bethune on general election day in November 1962, he was illegally challenging people, and he was definitely challenging them in a harassing manner. And I will stand on that information because I witnessed it with my own eyes.

The CHAIRMAN. What year was that?

Mr. PINE. 1962.

The CHAIRMAN. The distinguished ranking member.

Senator BIDEN. No questions.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. No questions.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. No questions.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Mr. Pine——

Mr. PINE. Yes, sir.

Senator HATCH. What do you do for a living?

Mr. **Pine**. Beg your pardon?

Senator **Hatch**. What do you do for a living? What is your living?

Mr. **Pine**. I still cannot hear you. I am sorry. I wear a hearing aid in my right ear.

Senator **Hatch**. What is your occupation?

The **Chairman**. He said what do you do for a living?

Mr. **Pine**. I operate, and have for the past 23 years, a public relations agency in the city of Phoenix. I also served as the Democratic State chairman from 1972 to 1976. My wife is taking a bar exam today, hopefully, to become a lawyer.

Senator **Hatch**. That is great.

Mr. **Pine**. I am also recognized as a respected businessman, and I defer to Senator DeConcini, who has known me for the past quarter of a century.

Senator **Hatch**. Nobody is doubting that.

Mr. **Pine**. Beg your pardon?

Senator **Hatch**. You provided a one-page sheet of testimony. I would like to read some of it.

Mr. **Pine**. Yes.

Senator **Hatch** [reading]:

> I appear before this committee as a concerned citizen, one who questions the proposed confirmation of William H. Rehnquist as Chief Justice of the U.S. Supreme Court. My major concern is that in years past, Mr. Rehnquist headed and participated in a blatant effort to deny the right to vote to members of minority groups in South Phoenix precincts in 1958, 1960, 1962, and 1964. The right to vote, in my estimation, is among the most precious of all our rights.
>
> Furthermore, Justice Rehnquist had demonstrated an alarming insensitivity to civil liberties and the bill of rights. He has rejected the notion that the Constitution requires total separation of church and state. He consistently votes against women and minority groups who contend they are victims of discrimination. He has consistently voted against the press in libel suits.

And you go on through—well, let me just read it:

> Prior to his 1971 appointment to the Court, he was a vigorous advocate of the arrest of anti-Vietnam war protesters, arrests that later were ruled unconstitutional by the Court in 1972. He opposed arguments that the Court should outlaw school desegregation which it later supported.

Let me ask one question. You stated that the phone call you received from an unknown female voter, was at the Bethune precinct in Phoenix.

Mr. **Pine**. Yes; I was working out of the county headquarters on East Roosevelt. The woman who called—I say unidentified because she was obviously very perturbed, and she hung up—said, "You people better get somebody down here and do something about this," and then hung up.

Senator **Hatch**. Are you aware that Mr. Bentson was the one authorized challenger who was removed forcibly from that precinct?

Mr. **Pine**. I was not aware of that.

Senator **Hatch**. Are you aware that he is about 6 feet, 2, and 220 pounds, and the Associate Justice of the Supreme Court is 6 feet, 2, about 195 pounds?

Mr. **Pine**. I was not aware of that. After the Bethune incident, we toured a few other precincts and then I returned back to——

Senator **Hatch**. I see.

Mr. PINE [continuing]. Headquarters and continued taking telephone calls.

Senator HATCH. This was 24 years ago?

Mr. PINE. Sir?

Senator HATCH. This was about 24 years ago?

Mr. PINE. Yes; exactly 24 years ago in November.

May I make one point, Mr. Chairman. Nobody has asked this question. I think it is significant. Why did Mr. Rehnquist organize these "flying squads," and what did he hope to gain by disqualifying Democratic voters in heavily Democratic districts, districts that honestly might be described as strongholds?

Obviously he could not affect the districts if he could disqualify several hundred voters. He could not change the outcome of the legislative races.

The members of the Arizona House and the Arizona State Senate continue to be Democrats elected from those districts, because their nomination was tantamount to election. But if he could disqualify a substantial number of votes, it conceivably could have an impact upon closely contested statewide races and we had many of them in those years, because we elected, in those years, every 2 years. We elected a Governor, an attorney general, a secretary of state, a State treasurer and members of the Corporation Commission who regulate our utilities. Highly important offices, and some of these were very closely contested, and 300, 400, 500 votes could make a great difference and determine who would be the victor and who would be the loser.

And that was the obvious strategy of this. A young attorney told me, who is now a Democrat and was then a young Republican:

> I was addressed by a member of, of Rehnquist's group and was told, if we can disqualify enough blacks and enough Mexican-Americans, we can elect Paul Fannin Governor in 1962.

And that is precisely what happened. Paul Fannin was elected Governor in 1962.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Just one simple question. Is there any doubt in your mind that the man with whom you were speaking at Bethune was William Rehnquist?

Mr. PINE. There is no doubt in my mind. I was 6 feet away from him when I was listening to the conversation as he approached the people in the line, and by coincidence, Senator Metzenbaum, a few weeks later, at a downtown Phoenix restaurant, I sat almost next to him. He was pointed out to me again. He is approximately my build, my height, strong jaw, wore glasses, and even then he was beginning to bald.

Senator METZENBAUM. What was the color of——

The CHAIRMAN. I do not want to inhibit anybody, but if we could answer the direct questions and not go into other things, it would save a lot of time.

Mr. PINE. Yes, sir.

The CHAIRMAN. You may proceed, Senator.

Senator METZENBAUM. What was the color of most of the voters that were in the polls?

Mr. PINE. Sir?

Senator METZENBAUM. What was the color of the voters in the polling place?

Senator DECONCINI. What was the color of the voters? What were they, Mexican-Americans, or Anglos?

Mr. PINE. Oh. There were about 30 or 40 in line when I arrived, and I would say at least half of them were blacks, and I would say the preponderance of the remainder were Hispanics, Mexican-Americans, and perhaps there was a scattering of 5 or 6 Anglos.

Senator METZENBAUM. Thank you very much.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Mr. Pine, welcome very much, and good luck to Selma. Please tell her that I hope she passes the bar, be an outstanding lawyer, and I want the record to show Mr. Pine is an outstanding businessman, and has a long career of community service to the city of Phoenix, and we, as Democrats, are indebted to his service as our party chairman for a number of years.

He is a good friend of mine, and I appreciate that he is here. I do want to ask you, Charlie, if I can, a couple of questions.

When you were at the polls, at the Bethune precinct, and you saw what was happening there, were there any other Republicans there?

Mr. PINE. There were two, two members of—with Rehnquist, two other men standing there, but they did nothing but——

Senator DECONCINI. Do you know who they were?

Mr. PINE. No; I did not. I never saw them before in my life, and I do not think I have seen them since.

Senator DECONCINI. Could one of them have been Wayne Bentson?

Mr. PINE. I do not know, Senator. I do not even know Wayne Bentson.

Senator DECONCINI. When you went and called the Democratic——

Mr. PINE. I called county headquarters on East Roosevelt.

Senator DECONCINI. You were at the school, when you were at the Bethune precinct, you went and used a phone and called the Democratic headquarters to alert them that there was a problem down there?

Mr. PINE. Yes, sir.

Senator DECONCINI. Do you remember who you talked to?

Mr. PINE. I think I talked to Frankie Archer——

Senator DECONCINI. Frankie Archer.

Mr. PINE [continuing]. Who was the acting executive director of the party, and Frankie said she would get somebody on it right away. She would contact Charlie Hardy. I believe Charlie was coordinating the Democratic rescue squads that day.

Senator DECONCINI. And did anyone come?

Mr. PINE. I do not know. I left. I left shortly after—she said they would be on their way, shortly. I left a few minutes after Mr. Rehnquist and his party left. I wanted to tour other precincts and see if similar situations were taking place.

Senator DECONCINI. Do you know if anybody ever arrived from the Democratic headquarters?

Mr. PINE. I understand just a few minutes after I left a couple of attorneys arrived, and nothing happened then.

Senator DECONCINI. Did you ever——

Mr. PINE. Nothing happened then. The Rehnquist party had left, the line was shorter, and I do not know what took place the rest of the day.

Senator DECONCINI. Did you ever ask, or, do you know today, what took place after you left Bethune precinct?

Mr. PINE. I heard there was a disturbance the latter part in the day, but it had nothing to do with Mr. Rehnquist, to the best of my knowledge.

Senator DECONCINI. At Bethune precinct?

Mr. PINE. I believe it is the same—yes, at Bethune.

Senator DECONCINI. Do you know if there was ever any complaint filed against any Republicans who were challenging voters in the Bethune precinct?

Mr. PINE. I do not know. It was not my prerogative. At that time, as you know, Senator, I was a volunteer. I was not a county chairman. I did not become a State chairman until 1972. I assumed it was the responsibility of Charlie Hardy, the county chairman, or, later on, Herb Ely, the State chairman, to file complaints.

I asked Mr. Ely, in 1971, if he planned to testify at the time that Mr. Rehnquist was being nominated as Associate Justice. He said no, he was not. I felt that it was his prerogative; he should do it.

The reason I did not testify in 1971 was nobody asked me.

Senator DECONCINI. Did you talk to Charlie Hardy, then then Democratic——

Mr. PINE. I spoke to Charlie Hardy. I spoke to Charlie Hardy that day, yes, and I told him about my experience.

Senator DECONCINI. And you told him about your experience?

Mr. PINE. Yes.

Senator DECONCINI. Did he tell you that anything had happened at that precinct as a result of your complaint?

Mr. PINE. I do not recall.

Senator DECONCINI. Did he tell you that he had visited precincts with Mr. Rehnquist?

Mr. PINE. He did not tell me that. I gathered from Mr. Brosnahan's, and other comments made today, that is what occurred. I believe you brought that out earlier today.

Senator DECONCINI. He happens to concur with you, in his statement that he gave, as to what the Republican Party was up to, but he also states that he did not think Mr. Rehnquist was involved in the challenges, but was involved in the legal representation of the party.

But he leaves a scathing report as to, or statement as to what the process was, and what the intent was, similar to what you have laid out today.

Now Mr. Pine, thank you for your time, and your commitment to our democratic process. I appreciate your being here. Thank you, Mr. Chairman. I have no further questions.

The CHAIRMAN. Mr. Sydney Smith. You have a statement you would like to make?

STATEMENT OF DR. SYDNEY SMITH

Dr. SMITH. Yes, I do. Unlike these other people who are at the table, I am not a lawyer. I do not have very much to do with lawyers, and I am, however, a psychoanalyst by training and a clinical psychologist by training. And some time during the early 1960's I became interested and invested in the political process in Arizona, got to know about the existence of one Mr. Rehnquist, and had the experience that is very similar to the one that Mr. Pine described, in which I went—and I cannot remember whether it was 1960—1960, or 1962. I think it was one of those years.

In any event, I went to a polling place with my friend, John Grimes, who was at that time the academic dean, or the retired academic dean at Arizona State University.

I was still on the university faculty myself as a professor of psychology. And in going to the precinct where the voting booths were, he had told me along the way, that there had been some difficulties with people arriving at the polling places, as Mr. Pine described, and attempting to frighten people off.

While we were there—I remember we were standing outside of the polling place. There was a long line that was wandering on the outside, and—that was winding around outside—and as we were standing there talking, this line was made up largely of black voters. There were some Chicano voters. I think there may even have been some Asian voters. We saw Mr. Rehnquist drive up, got out of the car. I cannot remember whether there was one or two men with him, but he had somebody with him.

He approached the line on the outside of the polling place. He held up some kind of a white card which I could not see, in front of two black men in the line and said: "You are not able to read, are you? You have no business being in this line trying to vote. I would ask you to leave."

At that point, Dr. Grimes immediately went over to the line. These two black men started to move away from the line and Dr. Grimes attempted to push them back into the line.

And at that point Dr. Grimes turned to me and asked me if I would get to the telephone and call the Democratic Party office, which I went off to do.

What happened while I was gone I am not entirely sure, but when I returned, after several minutes on the telephone, Dr. Grimes was indicating to me, as I saw myself, that Mr. Rehnquist and the man, or two men who were with him, had gotten back into their car and were driving away.

Now this was not—he was not in the role of a challenger at that precinct. He just came in and then flew out again, and the challenge that he provided these people, or confronted them with was not so much a challenge, it seemed to us, as a clear intimidation. And it was also true, that other people in the line had been upset and troubled by this experience.

So, that is the extent of my contact with Mr. Rehnquist in that regard.

The CHAIRMAN. Thank you. The distinguished ranking member, Senator Biden.

Senator BIDEN. Mr. Smith, is Mr. John McCurdy still alive?

Dr. **SMITH**. John Grimes?

Senator **BIDEN**. Grimes. I beg your pardon.

Dr. **SMITH**. J.O. Grimes. No. No. John—J.O. Grimes was about 70 at the time that that occurred, and I am very sure he is dead by now.

Senator **BIDEN**. I have no further questions but I have one statement, Mr. Chairman.

My office has received a telephone call a few minutes ago, well, actually about a half hour ago now, by a man identifying himself as William McCurdy, who alleges, by the telephone—I have no reason to believe this is true, or not—alleges to have been the FBI agent that accompanied our first witness to the polling place.

He gave us a phone number. The phone number is a number that is, the operator says is, quote, "blocked," cannot get through. I have asked the FBI—my staff from the Judiciary Committee asked the FBI whether in fact there was a Mr. William McCurdy who was an agent at the time, in 1962, in Phoenix.

I suspect the reason why he called is he is watching these proceedings. Mr. McCurdy, if there is such a Mr. McCurdy, please call home.

I would like very much to know—I would like to have the proper number, if in fact this is true. Again, I want to make it clear, I have no idea whether this is some prank, someone calling, but I will ask the witness: Do you recall a Mr. McCurdy, any William McCurdy?

Mr. **BROSNAHAN**. The name is familiar to me. The name William McCurdy is familiar to me, and I want to say, that he was an FBI agent in Phoenix. I have no idea whether he was the one that went with me that day.

As I have said earlier, some of the agents I knew very well because we worked on specific kinds of cases together all the time.

The name, William McCurdy, certainly rings a bell with me as somebody who could have been an FBI agent in Phoenix.

Senator **BIDEN**. Well, Mr. Chairman, I am sure the FBI will cooperate with us and let us know whether there was a Mr. William McCurdy who was an agent, in Phoenix, at the time, and I wanted to share that with the committee.

I thank you. I have no further questions. Thank you.

The **CHAIRMAN**. The distinguished Senator from Maryland.

Senator **MATHIAS**. Mr. Smith, or is it Dr. Smith?

Dr. **SMITH**. It is Dr. Smith, again.

Senator **MATHIAS**. Dr. Smith, you said that you observed a car drive up. Mr. Rehnquist and someone else got out?

Dr. **SMITH**. Yes.

Senator **MATHIAS**. How did you know it was William Rehnquist?

Dr. **SMITH**. I had seen him before in Phoenix. He was not unknown to, to people who were in the political stream at that time. He is a, he is a person who has an unusual—has unusual facial features, and I think once you take a good look at him, you do not forget it.

Senator **MATHIAS**. It is your testimony that he went up to some people in the line and flashed a white card at them?

Dr. **SMITH**. Yes.

Senator **Mathias**. Did he get out of the car and walk right up to these people, or, did he get out, and look around a little bit, and then single out people in the line?

Dr. **Smith**. No; his activities were very deliberate. He came directly to the line, and stood in front of these two black men who were there, and flashed this white card, and gave the little speech to them that I have described.

Senator **Mathias**. Which is to the effect, "You can't read so you're not qualified to vote?"

Dr. **Smith**. Yes.

Senator **Mathias**. That is all.

The **Chairman**. The distinguished Senator from Massachusetts.

Senator **Kennedy**. Mr. Smith, earlier in the course of the inquiry on these other witnesses, questions were raised about how they came to testify here before the committee, or, how did it come that they were willing to sort of "go public" about matters that took place some time ago.

Can you, to the best of your recollection, tell us why you sort of came forward, or why you became public, and what were the circumstances in which you did.

Dr. **Smith**. Well, sitting behind me in the two chairs are my daughter and my son. The—my son had heard me talk about the case with Rehnquist when it happened, and when Mr. Rehnquist was then nominated for the Supreme Court. I remember that we were at the dinner table and I brought up that incident again, and wondered how it was that a person who could act in this way could be a member of the Supreme Court. And then it was, to a very large extent, forgotten by me, until 2 or 3, or 4 days ago, whatever it was.

I received a hurried telephone call from my son, indicating that somebody was going to call me from Public Radio about my experiences.

I then received a phone call from Nina Totenberg, and she talked to me for a very few minutes on the telephone. It was not a phone call that I was really prepared to give, and I think I muddled my words with her in this discussion. But in any event, it was that occasion, and my son and daughter indicating that it was my patriotic duty to come forth, even though I am not so involved in politics anymore.

Senetor **Kennedy**. And that is really the reason that you are here today, is that you feel a citizen's responsibility to report as accurately as you possibly can, the circumstances which took place at the polling booths——

Dr. **Smith**. Yes.

Senator **Kennedy** [continuing]. In 19—I guess it was 1960 or 1962. Now Mr. Smith, I have inquired of the Justice about this story, and let me just review, very quickly, with you, what I said to him, and what he said, and get your reaction.

Dr. **Smith**. Yes.

Senator **Kennedy** [responding]:

> Smith states that on election day in 1960 or 1962, a poll watcher at a southwest Phoenix poll booth observed you arrive with two or three other men. He says he recognized you from political functions and is positive of his identification. States you approached a group of voters holding a card in your hand and said, "You

cannot read, can you? You do not belong here." Dr. Smith says the voters were intimidated by your actions.

Justice Rehnquist. I am sure he is mistaken as to the latter part. It is perfectly possible that I could have arrived at a southwest Phoenix polling booth with a couple of other people. And, again, I gather, he is not definite as to the years, because one of my jobs is notice reading. What I said in 1971, and recalling as best I can now, was to go to the polling places where our challenger was not allowed into the polling place, or if a dispute came up as to something similar to that, either I, or along with my Democratic counterpart would go. So, it is not at all inconceivable that I would have been with a group or two or three other people going to a southwest Phoenix polling place, in whatever year that was, but the latter part is false.

Senator Kennedy. Well, the activity described basically is personally challenging voters. That is the activity alleged, and you categorically deny ever having done that in any precincts in Maricopa County, in the Phoenix area, at any election? Is that correct?

That is correct.

Senator Kennedy. Well, what is "I think"? I mean, you would remember whether you did or not. I mean, it is not an event if you are talking about harassing—isn't it an event if you are talking about harassing or intimidating voters, something that you are going to forget very much about?

Justice Rehnquist. Senator, let me beg to differ with you on that point, if I may. I thought your question was challenging. Now you say harassing or intimidating. As to harassing or intimidating, I certainly do categorically deny any time, any place.

Would you characterize the activities that you saw at that polling place as harassing or intimidating voters from participating in voting?

Dr. Smith. Well, that is what it certainly looked like to me.

Senator Kennedy. For the reasons you have described in your testimony here today?

Dr. Smith. Yes.

Senator Kennedy. I had trouble understanding—it continues.

If you're talking about challenging—this is Rehnquist—I reviewed my testimony. I think I said I did not challenge during particular years. I think it is conceivable that in 1954 I might at least have been a poll watcher on the west side.

Senator Kennedy. Well, did you challenge individuals then?

Justice Rehnquist. I think it was simply watching the vote being counted.

Senator Kennedy. Then you did not challenge them?

Rehnquist. I do not think so.

Senator Kennedy. Well, you would remember whether you challenged them, or not, Mr. Justice, wouldn't you? Did you at any time challenge any individual?

Justice Rehnquist. A challenger, Senator, was someone who was authorized by law to go to the polling place. Frequently, the function was not to challenge but simply to watch the poll, watch the vote being counted. Well, that is fine.

As I understand your testimony, you said you were a poll watcher. The challenger has a different connotation.

Justice Rehnquist. To be a poll watcher at that time, I think you had to be a challenger.

Well, here we go around in semantics, which we have found the Justice very capable of doing. In the *Laird-Tatum* case we found that possible. We found it in terms of the Jackson memorandums, and we found it in terms of response to these questions.

But as I understand your testimony here today, is that you positively identified Rehnquist as being there, and you positively identified him doing the kinds of activities of requiring the voters to read from a card, and that you observed voters who were subject to that kind of activity leaving the line.

And that you are here today, really, in response to your children's belief that this is a patriotic duty. That at a time of conflicting testimony, that you have a positive citizen's responsibility to speak to this Judiciary Committee, and to the American people, to tell them——

Dr. SMITH. Yes.

Senator KENNEDY [continuing]. What you know to be factual and accurate and true, having taken a sworn oath to God?

Dr. SMITH. Yes. If I could say just one further thing, I would say that in the words of Justice Potter Stewart, on another occasion: I may not be able to define intimidation but I know it when I see it.

Senator KENNEDY. No further questions, Mr. Chairman; no further questions.

The CHAIRMAN. What year was that?

Dr. SMITH. Well, as I indicated, I was confused about whether it was 1960 or 1962.

The CHAIRMAN. Thank you. The distinguished Senator from Ohio.

Senator SPECTER. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Pennsylvania. Excuse me. I should have gone to you next. I beg your pardon.

Senator SPECTER. Thank you, Mr. Chairman. Dr. Smith, you say it was either 1960 or 1962?

Dr. SMITH. Yes.

Senator SPECTER. How do you determine the year?

Dr. SMITH. Well, I think that I was actually more heavily involved in Democratic politics in 1960, largely because John F. Kennedy was running, and he was an exciting candidate for all of us, and we were, all of us, trying to get involved in the political process at that time.

In 1962, I was still to some extent involved, but not as much as in 1960. So it had to have be one of those 2 years.

Senator SPECTER. Have you had contacts with Justice Rehnquist in political terms on other occasions?

Dr. SMITH. Well, not personal contact. I had seen him—I went to a speech he gave once in Phoenix, and had seen his picture in the newspaper on occasion, and had certainly heard about him enough.

Senator SPECTER. How long did the entire incident take, when Justice Rehnquist approached these men in line?

Dr. SMITH. Well, from the moment we saw him get out of his car with the one or two other people that were with him, he approached the line very rapidly, as if he knew exactly what he was going to be doing. He was not looking the scene over. He was coming directly to the line. And he went to these two black men who were standing in the line next to each other and engaged in the conversation that I described.

Senator SPECTER. All of this was outdoors?

Dr. SMITH. It was outdoors, yes.

Senator SPECTER. What time of the day or night did this occur?

Dr. SMITH. Well, I think it must have been in the late morning hours. It was probably—I would just make a guess that it was probably around 11 o'clock.

Senator SPECTER. Do you recall approximately how many people were in the line?

Dr. SMITH. Yes, there was a long line. It must have been—it must have been someplace between 20 and 30 people in the line.

Senator SPECTER. And you say he walked right up to two black men?

Dr. SMITH. Yes.

Senator SPECTER. Were they standing together?

Dr. SMITH. Yes, they were together.

Senator SPECTER. What was the racial mixture of the line, if you recall?

Dr. SMITH. Well, it was mostly blacks. I think there were some Chicanos in the line as well, but it was mostly a black precinct in this southwestern area.

Senator SPECTER. Did he speak to anyone besides these two black men?

Dr. SMITH. No; but then I don't think that Dr. Grimes gave him the opportunity to do that, since Dr. Grimes immediately started talking with him, after first turning to me and asking me to go find a phone and get a hold of Democratic headquarters, which I did.

By the time I arrived back, Rehnquist and his men were already on the way out.

Senator SPECTER. Did you discuss with Dr. Grimes what happened during the time you were gone?

Dr. SMITH. I can't remember whether we had a discussion at that time or not, but we certainly talked about it later.

Senator SPECTER. You heard Justice Rehnquist say, as you have testified, "You can't read; you're not qualified to vote"?

Dr. SMITH. Yes.

Senator SPECTER. Did he say anything other than that?

Dr. SMITH. Yes. He said at the end that "You should leave here."

Senator SPECTER. And what happened next?

Dr. SMITH. Well, both of these men, as I mentioned to you, then started moving away from the line, and it was at that point when Dr. Grimes moved up to these men and kind of pushed them back into the line, and then turned to me and asked me to go to the phone. Then I think he started talking with Mr. Rehnquist and whoever Mr. Rehnquist was with.

Senator SPECTER. Do you know who Justice Rehnquist was with?

Dr. SMITH. No; I never saw those men before or after.

Senator SPECTER. And Justice Rehnquist was with two other men?

Dr. SMITH. Yeah—I think it was one or two.

Senator SPECTER. Dr. Smith, how can you be sure with such precision what Justice Rehnquist said to these two men?

Dr. SMITH. Well, I think because I was so surprised by that kind of activity, and I was also very much incensed by it. I think the words were kind of emblazoned on my mind. You know, if you ask me what route I took to get to the polling place, I couldn't tell you. I can't even remember exactly the year. But those words were very much indelibly imprinted on my memory.

Senator SPECTER. And you say Justice Rehnquist said to the two black men, "You can't read"?

Dr. SMITH. Yes.

Senator SPECTER. Is it possible he could have asked them if they could read?

Dr. **Smith**. No; he did not ask them if they could read. He went up to them and said, "You cannot read, can you?"

Senator **Specter**. Was there any indication to you why he happened to pick these two black men out of this long line, which contained many other blacks?

Dr. **Smith**. No; they were closer to the end of the line.

Senator **Specter**. Were they at the very end of the line?

Dr. **Smith**. I'm not sure whether they were at the very end of—I think not. I think there were one or two people behind them. But he went rather deliberately to the line and then directly to these men.

Senator **Specter**. Do you recall if the people behind these two black men were white or black or Hispanic?

Dr. **Smith**. I really don't recall that.

Senator **Specter**. When you had the conversation with your family, where I believe you testified "How could a person who acted this way be a member of the Supreme Court," did you consider doing anything about it at the time?

Dr. **Smith**. No; I was by that time living in another State, far away from the scene. I really didn't even know how to go about doing that, or whether anybody was interested.

Senator **Specter**. Where were you living at that time?

Dr. **Smith**. I was living then in Kansas.

Senator **Specter**. Where in Kansas?

Dr. **Smith**. In Topeka, KS.

Senator **Specter**. Thank you very much, Dr. Smith.

Thank you, Mr. Chairman.

The **Chairman**. The distinguished Senator from Ohio.

Senator **Metzenbaum**. Thank you, Mr. Chairman

I might say, Mr. Chairman, it seems to me that perhaps your offices—that there ought to be some cooperation with Senator Biden, to see that that agent can be located.

The **Chairman**. You may proceed, Senator Metzenbaum.

Senator **Metzenbaum**. Thank you, sir.

Dr. Smith, in the inquiry we had with Justice Rehnquist, I said to him:

> There's a man by the name of Arthur Ross. now a deputy prosecutor in Honolulu. He told the FBI that he saw you and others in 1962 with a card which had on it a constitutional phrase asking prospective voters to read from it before entering the polls.

Do you have any recollection of ever having done that? Did you ever do it: Justice Rehnquist: "Did I ever ask a voter to read from a card? No, I do not think I did."

Then I said to him, "Did you ever ask a prospective voter to read from any text, whether the Constitution or otherwise?" Justice Rehnquist: "Not that I recall."

As I understand your testimony—in fact, your testimony as well as your statement on Nina Totenberg's radio program—you stated, "So I was standing with him—" that being Mr. John Grimes "—and it was he who brought to my attention Mr. Rehnquist standing by several black people and holding up some kind of little white card. And after he would talk with them very briefly, they would move away from the line and some of them actually left."

Is that a correct description of your conversation with Nina Totenberg?

Dr. **Smith**. Well, yes, it is a correct description of my conversation with her. As I mentioned to you, the telephone call from her came out of the blue. I was between patients. I was waiting for a patient to arrive and had just gotten rid of one. The scene was one in which I didn't have a lot of time to talk with her. As I mentioned to you, I didn't think that I had given her a very adequate description because my memory was not really tuned into that. It was not until later when I began to recall, and I talked with my wife, to whom I had also discussed this scene in detail.

So what I am telling you now I think is more the correct memory than what I was able to give her in a short, pressured time.

Senator **Metzenbaum**. Let me be sure I get the distinction.

In her interview, you said that there was somebody there with a card, showing it to—let me just be sure I don't misstate it. Standing, holding up some kind of little white card.

Now, is your testimony today a little bit different than that?

Dr. **Smith**. Well, no. There was no question about his showing them the card. It was a white card. I couldn't see what was printed on it. He was pushing this in front of their faces and indicating the words that I indicated. He did not ask them to read it.

Senator **Metzenbaum**. Then you said to her:

> And the matter of scaring people off, I think that there were some of the Chicanos there who were also frightened away. Mr. Grimes said he knew some of these people and he knew they could read, and out of that they were simply being frightened away.
>
> **Totenberg**. Do you know that he ever personally challenged voters?
>
> **Smith**. I seen that in newspaper accounts before.
>
> **Totenberg**. And as far as you're concerned, that is not true?
>
> **Smith**. That's absolutely not true; at least on this one occasion when we saw him engaging in this kind of activity, there was just no question as to what he was doing.

Is that a correct transcription of your statement and is it factually correct?

Dr. **Smith**. Yes; it is.

Senator **Metzenbaum**. Yes to both?

Dr. **Smith**. Yes.

Senator **Metzenbaum**. I have no further questions, Mr. Chairman.

The **Chairman**. The distinguished Senator from Alabama.

Senator **Heflin**. Let me see if I can get your testimony correct.

You were a Democratic poll watcher on this occasion?

Dr. **Smith**. Yes.

Senator **Heflin**. Was there some type of table or place where there was a polling judge or somebody, if challenges of an individual voter were to occur, you could go to this arbiter, this judge, who would make some determination I suppose, if the man voted, he would vote under protest—I assume there is some right of appeal or something on these things.

But was there some type of mechanism or table or chairs or some sort of thing set aside? Can you describe to me the scene, where the challenges were and where the polling judge might be located?

Dr. **Smith**. Well, I am sure that there was a table for such an activity inside of the building. At the time that I was describing to you, Dr. Grimes and I were both outside of the building. I think we had spent some time inside watching the process carefully.

But at the time, for some reason, he and I were outside the building. And I do not remember where we were there.

Senator HEFLIN. Now, inside the building was where you voted. Do you remember whether there were voting machines?

Dr. SMITH. Yes, voting machines, or the place where you could go into a little booth and mark your ticket. I am not sure we had machines then.

Did we have machines then?

Mr. PINE. In 1962 we had machines.

Dr. SMITH. Yes; but in any event, we had been inside of the polling place for some time. And for some reason, Dr. Grimes and I were standing outside talking to each other.

Senator HEFLIN. Do you remember if this was the Presidential election in which Kennedy was elected President?

Dr. SMITH. Well, I think that that was probably the year. But as I say, it could have also been in 1962. I just cannot remember that precisely.

Senator HEFLIN. Was there a line of voters waiting to go in and vote that extended outside the building?

Dr. SMITH. Yes, sir.

Senator HEFLIN. And it was in this line of voters outside the building that you and Dr. Grimes observed William Rehnquist with a card in his hand?

Dr. SMITH. Yes.

Senator HEFLIN. All right. Now, how big a card was it?

Dr. SMITH. Well, it is hard for me to say now. It seemed to me that it was about this big.

Senator HEFLIN. You do not know what was on the card?

Dr. SMITH. I do not know what was on it, no.

Senator HEFLIN. What did he ask him to do pertaining to the card?

Dr. SMITH. He didn't ask them to do anything. He simply had the card. He had it up in front of them. And then spoke the words to these people that I mentioned to you

Senator HEFLIN. What were the words? I must have missed something. I had to go to the floor and make a speech there——

Dr. SMITH. His words were: "You do not know how to read, do you? You do not belong in this line. You should leave."

Senator HEFLIN. But you do not know whether he asked them to read, or what?

Dr. SMITH. Yes; I do know that he did not ask them to read from the card.

Senator HEFLIN. He had a card.

Dr. SMITH. He had a card up in front of him, showing it to them.

Senator HEFLIN. He would state to them that you do not know how to read. But you never saw him ask them whether they could read or not?

Dr. SMITH. He did not ask them.

Senator HEFLIN. Well, did they read anything to him?

Dr. SMITH. No.

Senator HEFLIN. Did any of them read anything to him?

Dr. SMITH. No.

Senator HEFLIN. Well, now, if they did not read, how could he say that they did not know how to read? I mean, in order to read, did he not necessarily need a verbal response?

Dr. SMITH. Well, that is the intimidating part of the interchange.

Senator HEFLIN. In other words, you do not think he gave them a chance or what?

I am confused a little bit.

Dr. SMITH. Well, he certainly did not give them a chance at that point.

Senator HEFLIN. He just goes up and down, saying, you do not know how to read, and holding a card. Did he not give them the opportunity to show whether they could read or not?

Dr. SMITH. Well, we saw him do that, as we came up to the line, we saw him do that only to those two black men that were in the line near the end of the line, as I mentioned to you.

Senator HEFLIN. And he came to two black men, and he flashed the card toward them, and he said, "you do not know how to read?"

Dr. SMITH. Yes.

Senator HEFLIN. And you do not know whether there was writing on the card, or what was on the card, or anything about it?

Dr. SMITH. From where I was standing, I could not see the card. I could not see what was written on it.

Senator HEFLIN. Now, at that time there has been some testimony—was he wearing glasses?

Dr. SMITH. Yes, I think he was wearing glasses.

Senator HEFLIN. Well, there have been some, either statements or something, some people have said that he was, and some said that he was not, at that time. And there has been a little confusion.

Senator KENNEDY. If the Senator would yield, I think that refers to another witness.

Senator HEFLIN. I know, I mean I said, some witnesses.

Senator KENNEDY. But not this witness.

Senator HEFLIN. Well, that is why I was asking him about it.—whether he did or did not.

Did you go in to where the polling judge or the judge that took the challenges were? Were you sitting in there with him at any time, at a table, or in the presence of the polling judge, with Mr. Rehnquist?

Dr. SMITH. No; he was not inside at that time.

Senator HEFLIN. You never did see him inside?

Dr. SMITH. No; he never went inside.

Senator HEFLIN. Did you ever go inside?

Dr. SMITH. Yes; I was inside. When we first went there, at the beginning of the duty that we had assigned to us, we were in there at that time.

Senator HEFLIN. And how long would you say you stayed inside?

Dr. SMITH. Well, I was there probably a couple of hours before Dr. Grimes and I went on the outside, and we were standing outside, near the end of the line.

Senator HEFLIN. Do you remember seeing any of the witnesses who are here there on that occasion other than Dr. Grimes?

Dr. SMITH. No; I do not.

Senator HEFLIN. You do not?

I believe that is all.

The CHAIRMAN. Did you have a question?

Senator MATHIAS. One further question, Mr. Chairman.

The CHAIRMAN. The senior Senator from Maryland.

Senator MATHIAS. You indicated when I asked you earlier that Mr. Rehnquist got out of the car with his companion or companions?

Dr. SMITH. Yes.

Senator MATHIAS. And walked immediately to the two men to whom he presented this card?

Dr. SMITH. Yes.

Senator MATHIAS. Now, you have testified that the racial composition of the line was predominantly black?

Dr. SMITH. Yes.

Senator MATHIAS. So there was not the factor of color that identified these two people as the two he should immediately walk up to?

Dr. SMITH. No.

Senator MATHIAS. But it appeared to you as though he walked directly to them?

Dr. SMITH. Yes.

Senator MATHIAS. Were there any distinguishing characteristics about them that would lead you to conclude why he walked to those two men?

Dr. SMITH. No; I cannot honestly tell you, Senator.

Senator MATHIAS. They might have been any other two men in the line?

Dr. SMITH. Yes.

Senator MATHIAS. As far as you could tell?

Dr. SMITH. Yes.

Senator MATHIAS. All right.

Thank you.

Senator KENNEDY. Mr. Chairman, could I ask just one?

The CHAIRMAN. OK. Are you through?

Senator KENNEDY. Mr. Chairman, Senator Metzenbaum made reference earlier to a question whether the FBI could not be of help to this committee in trying to locate the agent that was with Mr. Brosnahan back at those precincts. It seems to me that they must have their files, they must have their sheets, they must have the records. And when you have the kind of testimony that comes from a former assistant U.S. attorney, I find it somewhat puzzling that the FBI could not have been helpful to the committee in attempting to locate that individual to date. I appreciate the efforts that are being made by Senator Biden on this to locate him.

But I would certainly hope that we could request from the FBI, if it is at all possible, that we locate that particular agent.

The CHAIRMAN. It has already been done, Senator.

Senator KENNEDY. Well, that will be good.

Finally, let me just ask—I want to again thank Mr. Smith for his statement. I understand his children are here. There is Ann Smith who is sitting behind him, and Christopher Smith.

I just might ask one question, and that is: Mr. Smith, Christopher Smith—or could I ask Christopher Smith, are you a Republican or a Democrat?

Christopher Smith. I am a registered Republican at the moment.

The **Chairman**. That is a little out of the ordinary, Senator. We swear in the witnesses. [Laughter.]

You strike that from the record unless he will be sworn first.

Senator **Kennedy**. Yes.

The **Chairman**. Any other?

Senator **Kennedy**. Well, then I will mention as a member of the committee that Christopher Smith was here at this table, and that it is my judgment is registered as a Republican.

The **Chairman**. But you are not testifying, Senator.

Senator **Kennedy**. But I can say what I please.

The **Chairman**. Well, you can say what you please but——

Senator **Kennedy**. Well, I just did. [Laughter.]

The **Chairman**. I will let him come up and swear him if you want to do that.

All right, we will move on.

Are there any other questions here?

Again, I repeat, that this side agreed to 4 hours today. And you have already had 8 hours. And we are going to finish this matter up today.

Senator Pena? Do you have any statement to make?

STATEMENT OF MANUEL PENA

Mr. **Pena**. Yes, Mr. Chairman.

I was a volunteer party worker for the Democratic Party.

The **Chairman**. If you could summarize your statement in about 3 minutes; then there will be questions.

Mr. **Pena**. I was a volunteer party worker for the Democratic Party in the general election of November 3, 1964. My assignment was to cruise south Phoenix precincts and western Maricopa County precincts. I was provided an automobile with a telephone. And what I was to do is, whenever I got a call, if a problem existed at one of the precincts, I was to go there and try to resolve it.

I was called to Butler precinct. All of this occurred in the morning of that day. I was called to Butler precinct and told to go check a problem, there was a hangup on voting.

And when I got there, there was a long line of people standing outside of the polling place, waiting to get in to vote. The line was four abreast. There had to be about 100 people waiting to get inside the polling place.

I went on into the polling place and asked the inspector what the hangup was. She told me that there was this fellow sitting at the end of the table, and he was sitting at the wrong place, was questioning everybody that came in, and slowing down the process.

We had six machines inside of that Butler precinct, and only two of them were being utilized as a result of the slowdown of voting.

I told the inspector that the proper thing to do would be to take the challenger and whoever he is challenging and move him to a corner of the building; let him ask all the questions that he wanted to; and allow the rest of the people to vote, instead of questioning the voter in line, holding up the other people from voting.

The fellow objected to this. And at that point I stepped in between him and the people who were moving into the line, and I told him, you are in the wrong place as a challenger. You should be behind the inspector, and you should only challenge if you have a good cause to challenge.

He was asking everybody who came in what their name was, where they lived, how long have they lived there, that kind of thing. I told him that was not a legal way to challenge. And he said he wanted to make a telephone call, so I took him into the principal's office—Butler is a school—and he made his call.

I do not know who he called. But after talking to somebody for a few minutes, he told me that he was told that what he was doing was correct, and that he was going to continue to do it.

And I told him that he was not going to do it because it was not the correct way to challenge. He could challenge if he wanted to if he did it in a correct manner.

At any rate, he insisted that he was going to do it again. He went back into the polling place. My job was to call back to headquarters and tell them what had occurred, and they would send somebody out to take care of the problem.

When I did that, I was given a message to go to another precinct and check another problem there. I returned to Butler precinct about 30 or 40 minutes later, and the line had diminished, people were voting. I went inside the polling place and asked the inspector what had happened.

And she said that somebody came in and had an argument with the challenger, physically removed him from the polling place, and had a conversation with him outside, and the fellow disappeared.

And so we had kind of a peaceful election after that at that polling place.

Now, later—a few years later—I saw a picture in the paper of William Rehnquist. And I recognized him from that picture as the person who was doing the challenging inside the polling booth, inside the polling place, and who was impeding the traffic of voters into the booth.

And that is how I came to know that Mr. Rehnquist was involved.

The CHAIRMAN. What year was this?

Mr. PENA. 1964.

The CHAIRMAN. 1964.

And you did not recognize him until years later, did you say, you saw a picture of him?

Mr. PENA. That is correct, yes.

The CHAIRMAN. That is all.

The distinguished Senator from Massachusetts.

Senator KENNEDY. You have no doubt in your own mind, having seen that picture a number of years ago and of pictures subsequently, about the identification of the individual that you claim to be Mr. Rehnquist?

Mr. PENA. I do not have any doubt at all. It was him. We had a close confrontation. And we had some words for at least 30 minutes, both inside the polling place and on our way to the telephone at the principal's office, in the principal's office, and after his telephone call.

So when the picture came out in the paper, I told my wife—I read the paper at breakfast, and I told my wife, this is the guy that was challenging people and holding up voting at Butler precinct in 1964.

Senator KENNEDY. As a result of those challenges, did any of the people leave the line?

Mr. PENA. I think that was the whole idea, to discourage people from voting. I did not see anybody leave, because——

Senator KENNEDY. What was the color of the people being challenged? Did you make any judgment?

Mr. PENA. The precinct at that time was about 40 percent Hispanic and perhaps 1 percent black.

Senator KENNEDY. No further questions.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. No questions

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Are you presently a State senator?

Mr. PENA. Yes; I am.

Senator METZENBAUM. And how long have you been a State senator?

Mr. PENA. Fourteen years, and prior to that—I was 6 years in the House. It is my 20th year in the legislature.

Senator METZENBAUM. For 6 years you were a house member?

Mr. PENA. For 6 years.

Senator METZENBAUM. I am not sure I heard all of your testimony. You may have stated this.

But when you told Mr. Rehnquist that the correct way to do the matter, to raise these issues, is to take the person aside. Is that what you said?

Mr. PENA. Yes.

Senator METZENBAUM. And what did Mr. Rehnquist say to you?

Mr. PENA. He objected to that procedure. He said he had a right to stay where he was. And he had a right to question anybody that he wanted to.

And at that point, I stepped in between him and the people who were coming in to vote to stop him from asking those kinds of questions.

Senator METZENBAUM. I have a statement here, I am not sure whether it is yours. Pena was close to taking a poke at him. I do not know if that is a correct statement or not.

Mr. PENA. Well, when we went into the principal's office to make that telephone call, after making the call, we had another conversation where he told me that he had been told that he should continue doing what he was doing. And I told him that he was not going to do it.

And I do not know whether—I think probably I pushed him first, backward, saying, you are not going to do it anymore. At that point, he measured his fist at my face, and I said, OK, if that is what you want I will get somebody to take care of it.

And he went back into the polling place, and that is when I went out to make my call to headquarters.

Senator METZENBAUM. Thank you very much.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Mr. Chairman.

Senator Pena, thank you for joining us and being here. Senator Pena has an outstanding career of service to the State of Arizona, State house and in the senate.

Senator, in the course of your statement that I read—and I am sorry that I had to be out for the first part of your statement here—you indicate, if I am correct, that on the phone call that you got when you were a troubleshooter driving around, and you went to the Bethune precinct and that—is that not correct? Please correct me.

Mr. PENA. Butler precinct.

Senator DECONCINI. I mean Butler precinct. When you went to Butler precinct, you encountered Mr. Rehnquist?

Mr. PENA. I did not know it was Mr. Rehnquist.

Senator DECONCINI. You did not know then, but it turned out to be Mr. Rehnquist?

Mr. PENA. Yes.

Senator DECONCINI. Were there other people there, other Republicans, challengers, or anybody else?

Mr. PENA. No.

Senator DECONCINI. He was the only one?

Mr. PENA. He was the only one inside the polling place.

Senator DECONCINI. And did you observe him—what did you observe him doing?

Mr. PENA. He was asking each person as they came in what their name was. He was doing this before the inspector had a chance to recognize the voter.

Senator DECONCINI. At the door, but before they signed in?

Mr. PENA. Well, he was sitting at a table like this, where the inspector, the judge, the clerk, and a marshal sit, and he was at the end of the table:

Senator DECONCINI. He was asking their names?

Mr. PENA. Asking their name as they came in, what is your name, where do you live. And since you can only come in in a single line, that delayed the other folks from coming in and voting.

Senator DECONCINI. You mean the fact that he asked the question and slowed it down?

Mr. PENA. Yes.

Senator DECONCINI. Now, when you confronted him, apparently you confronted him about this. And if I understand your statement, you stepped out into another room and made some phone calls, or did he do that, or what?

Mr. PENA. No; he said he wanted to make a telephone call.

Senator DECONCINI. He wanted to make a phone call?

Mr. PENA. Yes; so I said, all right, come on. he did not know the area too well. So I took him around to the principal's office, which is in another building. And there I asked the principal's secretary to allow this fellow to make a call, which she did.

Senator DECONCINI. Were you there when he made the call?

Mr. PENA. Yes; I was inside the office.

Senator DECONCINI. Who did he call?

Mr. PENA. I have no idea.

Senator DECONCINI. You do not know who he called?

Mr. PENA. No.

Senator DeConcini. Do you think it was Republican headquarters?

Mr. Pena. I think that is obvious, but I am not sure.

Senator DeConcini. He did not say to you.

Mr. Pena. He did not tell me who he was going to call.

Senator DeConcini. After the call, what did he say?

Mr. Pena. He said that he was told that what he was doing is correct and that he was to continue to do it.

Senator DeConcini. Now, that person turned out to be, in your judgment, later, Mr. Rehnquist?

Mr. Pena. Yes.

Senator DeConcini. Based on a picture that you identified?

Mr. Pena. Yes.

Senator DeConcini. Based on what you have heard today, that Mr. Rehnquist was the strategist or the head of this 12-man committee, according to then-Chairman Staggs, to do what they could toward the election challenges, does it make sense to you that he would call anybody when he was the lead guy to get permission to come back and tell you that, I know it is all right, or I am told it is OK to do what I am doing?

Mr. Pena. Yes, it does; because in the other precincts we encountered the same thing. They would called for reinforcements.

Senator DeConcini. They what?

Mr. Pena. They called for reinforcements.

Senator DeConcini. You mean for more people.

Mr. Pena. Right. And I am assuming that is what he did.

Senator DeConcini. Oh, you think he called, not—you think he called to have more people come down and help him.

Mr. Pena. Yes.

Senator DeConcini. Not to conclude that what he was doing was OK?

Mr. Pena. No, to help him continue to do what he was doing.

Senator DeConcini. To help him? But he told you that what he was doing, he had checked out, and it was OK?

Mr. Pena. Yes.

Senator DeConcini. Did you—how long did you stay there, Senator? Do you remember?

Mr. Pena. I believe that I was there approximately 30 minutes, maybe 40 minutes, trying to——

Senator DeConcini. Did you leave before mister—this gentleman, Mr. Rehnquist?

Mr. Pena. Did I do what?

Senator DeConcini. Did you leave before this gentleman, Mr. Rehnquist?

Mr. Pena. Yes, when I called in to headquarters and told them what the problem is, and what I thought we needed to do to clear it up, at the same time, they gave me a message that I was to go to another precinct and try to correct another problem in that area.

Senator DeConcini. And so did you go?

Mr. Pena. I left.

Senator DeConcini. Did you go to another precinct?

Mr. Pena. Yes.

Senator DeConcini. Which one did you go to?

Mr. PENA. Let us see. We were at Butler's, so I think I went up to Brown precinct.

Senator DECONCINI. Brown, and what did you find there?

Mr. PENA. It was a—at Brown precinct, we had the identical thing, except that the fellow who was doing the challenging realized, or apparently believed what I said, and he quit doing what he was doing.

Senator DECONCINI. And you did not make any telephone calls from Brown?

Mr. PENA. No.

Senator DECONCINI. Did he leave, or did he just——

Mr. PENA. He stayed. I came back later on to check and see if——

Senator DECONCINI. Were there Democratic poll watchers there, too?

Mr. PENA. I was the poll-watcher——

Senator DECONCINI. For several polls?

Mr. PENA. Yes.

Senator DECONCINI. Roving around between poll-watchers?

Mr. PENA. Yes.

Senator DECONCINI. I mean between polling places.

Did you ever go to Bethune precinct?

Mr. PENA. Yes.

Senator DECONCINI. And what did you find there?

Mr. PENA. That was early in the morning, and what we had there was a slow reader.

Senator DECONCINI. A slow what?

Mr. PENA. Reader.

Senator DECONCINI. OK.

Mr. PENA. You know, the inspector gets the name and then passes the name on to a judge or a clerk.

Senator DECONCINI. Yes; I just did not hear.

Mr. PENA. And there was a hang-up before she could find the name, and so what we did is replace that reader with another—that judge, or I think it was a clerk, with another person who was a faster reader.

Senator DECONCINI. So it was moving slowly?

Mr. PENA. It was a slow-moving line, yes.

Senator DECONCINI. Was there a Republican challenger there, do you recall?

Mr. PENA. Yes, yes, there was.

Senator DECONCINI. Do you remember the name Wayne Benson at all?

Mr. PENA. No; I did not ask for names.

Senator DECONCINI. Was there any confrontation or anything other than delay or moving slowly at Bethune when you were there?

Mr. PENA. Not at Bethune, no.

Senator DECONCINI. Did you only visit Bethune once that day?

Mr. PENA. No, no. I—

Senator DECONCINI. Went back and forth?

Mr. PENA. I must have hit Bethune three or four times.

Senator DECONCINI. Just for the record, Senator Pena, what was your understanding—and I realize that is a long time ago—as a

Democratic representative, a poll-watcher or challenger—what was your understanding of what the law that a challenge could be made?

Mr. **Pena**. In my opinion, a legitimate challenge should be based on probable cause, on concrete evidence that that individual failed to do something; he did not live where he lived.

Let me point out to you that that year, the Republican Party sent out a mailing to every Democrat, registered Democrat, in south Phoenix. They might have done this throughout the State; I do not know. But they did that, and so if any envelopes were returned, that was their basis for a challenge.

Senator **DeConcini**. That is what they primarily used?

Mr. **Pena**. Right.

Senator **DeConcini**. Was it effective, do you remember?

Mr. **Pena**. It is a challenge in that manner, yes, and it was legitimate because if a person did not live where he said he was registered to vote and he had moved away from there to another precinct, then he was not eligible to vote in that precinct.

This fellow at Butler was not using the envelopes. They were there, but they were not being used.

Senator **DeConcini**. And you probably already told the committee; what was he doing?

Mr. **Pena**. He was challenging each one that came through the line, asking what is your name, which is the responsibility of the inspector, but he was up front, the first one up there.

Senator **DeConcini**. Was he next to the inspector?

Mr. **Pena**. At the end of the table, the inspector sitting where Charlie is sitting and—

Senator **DeConcini**. And this man was sitting next to him?

Mr. **Pena**. Right at the end of the table.

Senator **DeConcini**. Oh, right at the end?

Mr. **Pena**. Yes.

Senator **DeConcini**. And he was asking the name instead of the inspector asking?

Mr. **Pena**. Yes; as they came in. What is your name?

Senator **DeConcini**. Did he do something else?

Mr. **Pena**. Other than ask him questions in that manner and slowing down the flow—

Senator **DeConcini**. Mostly delay, causing delay?

Mr. **Pena**. Delaying tactics.

Senator **DeConcini**. Thank you, Senator Pena, very much.

The **Chairman**. The distinguished Senator from Alabama.

Senator **Heflin**. Senator Pena, let me try to get it straight. You were there and you saw this; you protested it. And he indicated he wanted to go to the phone; he did not know where to go. You took him and guided him to it.

Now, when did the fray occur between you? Was this after the phone call or before the phone call, where you pushed him and he balled his fist up?

Mr. **Pena**. After the phone call.

Senator **Heflin**. After?

Mr. **Pena**. Yes.

Senator **Heflin**. And that was where he came back from the phone call and told you that he had been told that it was all right to do what he was doing?

Mr. **Pena**. That is correct.

Senator **Heflin**. And then you—did he say he was going to continue to do it?

Mr. **Pena**. He did not say it. He went back to inside the polling place and continued to do it.

Senator **Heflin**. And when did you push him?

Mr. **Pena**. When we were inside the principal's office.

Senator **Heflin**. When he came from the phone?

Mr. **Pena**. Yes, after he got through with his telephone call and he told me what they had told him, and I said you are not going to do it anymore because that is not the right thing to do.

And he looked a little belligerant to me, so I pushed him back and he balled up his fist and aimed it in my face and I pushed him again and I—

Senator **Heflin**. You pushed him again?

Mr. **Pena**. Yes. I pushed him away from me because we were, you know, this close and—

Senator **Heflin**. Eyeball to eyeball?

Mr. **Pena**. Eyeball—we were eyeballing each other, yes.

Senator **Heflin**. How tall are you?

Mr. **Pena**. I am about six foot, maybe six-one in my shoes.

Senator **Heflin**. I had not seen you standing up.

Now, when he balled up his fist, what did you say then?

Mr. **Pena**. I did not say anything. I just pushed him back and then I said, if that is what you want, I will get some of that for you.

Senator **Heflin**. Now, at that time, did he have on glasses?

Mr. **Pena**. Yes.

Senator **Heflin**. All right. Now, did you have on glasses?

Mr. **Pena**. Myself?

Senator **Heflin**. Yes.

Mr. **Pena**. Yes, sir.

Senator **Heflin**. You both were wearing glasses.

All right, sir. Now, the picture that you—the photograph that you saw, you said you saw it a few years later. What is your best judgment as to the length of time from that incident until you saw the photograph in the newspaper? I suppose you saw it in the newspaper, was it not?

Mr. **Pena**. Yes; since this came up, I have been trying to pinpoint the time, more or less, and I would suspect that it must have been in 1971, although it could have been prior to that, as Mr. Rehnquist was very active with the Goldwater campaign and the Richard Kleindienst campaign. So it might have been before 1971.

This is the first time I had ever seen that picture and I recognized him immediately as the fellow who was doing the challenging at Butler.

Senator **Heflin**. Now, the incident that occurred, did it occur in 1960 or 1962?

Mr. **Pena**. 1964.

Senator **Heflin**. 1964; is that when this occurred?

Mr. **Pena**. Yes.

Senator HEFLIN. This was in the Goldwater campaign at that time?

Mr. PENA. Yes.

Senator HEFLIN. That is when the incidents occurred out at the—what is it, the Butler precinct?

Mr. PENA. The Butler precinct.

Senator HEFLIN. Now, you are not certain as to whether you saw the photograph in 1971 or when it occurred—but you said a few years. Could it have occurred in the Goldwater—it must have been, because Goldwater ran in 1964.

That would have been the same year. When you said a few years then, it would not be that one, or could it have been the Goldwater year?

Mr. PENA. I had not seen his picture before and, as I said, it could have been anywhere in between, after the election in 1964.

Senator HEFLIN. Well, you said a few years.

Mr. PENA. Yes.

Senator HEFLIN. Is it your best judgment that there was a passage of at least 1 year, 2 years, 3 years, 4 years, between the incident and the time that you said you saw the photograph?

Mr. PENA. As I indicated, I have been trying to pinpoint the date when I might have seen that picture. I cannot be specific, but I do know that the picture did appear when he was nominated to the bench, so that might have been when I saw the picture.

Senator HEFLIN. Now, was the picture that you saw in the paper, was it a mugshot—that is, a picture of him alone—or was it a picture of more than one individual in a photograph?

Mr. PENA. It was a face shot.

Senator HEFLIN. A what?

Mr. PENA. Face.

Senator HEFLIN. Face shot, a mugshot?

Mr. PENA. Yes.

Senator HEFLIN. And was that picture—did he have glasses on in that picture?

Mr. PENA. Yes.

Senator HEFLIN. I believe that is all.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Mr. Pena, I have a couple of questions for you. Did you personally know Mr. Rehnquist in 1964?

Mr. PENA. No, no.

Senator HATCH. You did not know him from the man in the moon. Is what you are saying? Is that right?

Mr. PENA. I do not know the man in the moon either.

The CHAIRMAN. Speak out so we can hear you.

Mr. PENA. Pardon?

The CHAIRMAN. Speak out so we can hear you

Mr. PENA. I wonder if Senator Hatch would do the same because I cannot seem to hear you too well.

Senator HATCH. I am sorry. I could not hear you.

Mr. PENA. Would you speak up so I can hear what you are saying?

Senator HATCH. In 1964 did you know Mr. Rehnquist?

Mr. PENA. I did not know Rehnquist, no.

Senator HATCH. Not at all?

Mr. PENA. Not at all.

Senator HATCH. According to a recent statement that you made, your sole basis for identifying Mr. Rehnquist at that time, a man you had only met once, which you claim you met in 1964, was a picture you saw 7 years later in the newspaper. Is that correct?

Mr. PENA. Well, I did not say 7 years later. I said——.

Senator HATCH. Approximately 7 years later.

Mr. PENA. All right, approximately is fine, yes.

Senator HATCH. Approximately 5 years later. I am sorry; I did not mean to misstate it.

Mr. PENA. Approximately, in between 1964 and 1971.

Senator HATCH. That is why I said 7 years.

That is all I have, Mr. Chairman.

Senator HEFLIN. Let me ask you this: Why do you pick out the year 1971 as being the latest year you would have recognized the photograph?

Mr. PENA. Well, the reason I am doing that is because as the nominee, as President Nixon's nominee, he had to have appeared not only in the newspapers, but on television. And like I said, I wish I could pinpoint the day when the picture I saw and recognized him as the fellow who was a Butler precinct—.

Senator HEFLIN. But you associate seeing the photograph, whenever you saw it—do you associate that with his nomination to the Supreme Court as Associate Justice, or do you associate it with some other factor?

Mr. PENA. I associated him with the challenging at Butler School.

Senator HEFLIN. I know, but do you associate why the photograph was in the newspaper?

Mr. PENA. No.

Senator HEFLIN. You say it is 1971, and I assume that what you are doing is that you are assuming that that would have been the height of his publicity; that you would have had an opportunity to view it, and therefore that would be the latest possible date, since, that was the way that you put it, as to the—somewhere between 1964 and 1971.

But you do not associate any material fact about the photograph or what newsworthiness he had obtained to be in the newspaper?

Mr. PENA. I do not.

Senator HEFLIN. You do not.

Mr. PENA. I just remember a picture, and it looked like the fellow.

Senator HEFLIN. Were you then in politics in the State senate?

Mr. PENA. No, sir. I was elected in 1966 and began serving in 1967.

Senator HEFLIN. Well, what I am saying is that at the time that you saw a photograph, could you have been in the State senate?

Mr. PENA. No; I was elected to the house. I served in the house for 6 years, so my first election was 1966.

Senator HEFLIN. Your first election was 1966?

Mr. PENA. Yes.

Senator HEFLIN. While I am here, might I ask Dr. Smith something about those glasses? I see something about a Mr. Robert Tate talking about glasses. I did not know who it was, but someone did present it and I read it. So it was not you, if there was any confusion on that.

The **Chairman**. Senator Simon, do you have any questions?

Senator **Simon**. I do not. I regret I have been away at another meeting

The **Chairman**. I just have one question I would like to ask each one of you for the record, and we will just start with Mr. Brosnahan and go on down to Mr. Mirkin and Mr. Pine, Mr. Smith, and Mr. Pena.

What positions have you held as a Democrat, and what, also, positions have you held in the Democratic Party?

Mr. **Brosnahan**. I was a member of the town committee, which had 700 members, in Wellesley, MA, for about 2 years when I was in college.

The **Chairman**. Speak a little bit louder.

Mr. **Brosnahan**. Yes; I am sorry, Mr. Chairman.

I am just trying to recall because it is not—in this group, it is not a terrific political career. The only other position that I have ever held in the Democratic Party—I was some kind of—I was a precinct person in Phoenix in about 1960 and I was—this is not the Democratic Party, but if you are talking about campaigns, I have been in a lot of campaigns.

And I was, in 1960, the chairman of the Youth for Kennedy in the State of Arizona, and then I have been in other campaigns in San Francisco and California. I do not know if you want those or not, but I have participated in Presidential campaigns, usually on behalf of lawyers' groups and that kind of thing, and that is the extent of it.

The **Chairman**. You were assistant U.S. attorney under what administration?

Mr. **Brosnahan**. I was appointed by Robert Kennedy, effective April 10, 1961, and then I was reappointed for the San Francisco office in February 1963, and I believe that was still Robert Kennedy at that time.

The **Chairman**. Thank you.

Mr. Mirkin.

Mr. **Mirkin**. Yes; all my positions were in Arizona. In the 1950's, I was a precinct committeeman. In the late 1950's, early 1960's, I was Young Democratic National committeeman, and in 1964 I was a delegate to the National Nominating Convention.

The **Chairman**. Mr Pine.

Mr. **Pine**. Mr. Chairman, I was active initially in the Democratic Party in my native State of Rhode Island. I was secretary of the Young Democrats. I was vice chairman of the Providence City Democratic Committee, and I was chairman of the State Committee Speakers Bureau.

I moved to Arizona 33 years ago because of my infant son's health, asthma. I could not become active in the party immediately because I was public relations director for a major bank. I was forbidden from taking a public role.

When I left the bank to establish my own business, I gradually became more and more active with the party. In 1978, I was a member of the delegation in Chicago. I became a precinct committee person in 1968; I have held that title of precinct captain ever since.

I became a district chairman in 1969, 1970, and 1971. I became chairman in 1971 of Nucleus Club, our principal fundraising arm. I became chairman of the Democratic State Party of Arizona in 1972, and I held it for 4 years and stepped down.

I am currently a member of the executive committee. Of course, as I was chairman for those 4 years, I was also a member of the Democratic National Committee. Currently, my only two political affiliations, other than the precinct committeemanship which I still hold—I am captain of my little precinct. I must hold that position in order to be eligible for the State committee.

I must be eligible for the State committee in order to be elected to the executive committee. I am on the executive committee. I also author as a labor of love a political news weekly called "Political Potpurri," in which I comment on the local, State, and sometimes national scenes, and I have several hundred private subscribers, one-third of whom are Republicans or Republican-oriented.

The **CHAIRMAN**. Senator Pena.

Mr. **PENA**. Yes, sir, as a precinct committeeman, precinct captain, district chairman, assistant county chairman, county executive board, State executive board. I was vice chairman of voter registration for the State party in 1964, and I was chairman of the Maricopa County Democratic Party's effort on voter registration in 1964.

The **CHAIRMAN**. Mr. Smith.

Dr. **SMITH**. I was elected precinct committeeman, which was a job I held for 2 years.

Senator **SIMON**. Mr. Chairman, may I——

The **CHAIRMAN**. The distinguished Senator from Illinois.

Senator **SIMON**. If I may just ask one question to follow up the chairman's question I would like each of you to answer. Are you here for any partisan reason, or are you here simply because, as good citizens, you are interested in justice in this country?

Mr. **PINE**. May I respond to that, Mr. Chairman, if that question is directed to us individually or collectively?

Senator **SIMON**. I would like each of you to respond.

The **CHAIRMAN**. If you will please make your responses very brief now, we are going to move right on to the next panel.

Mr. **PINE**. I understand, Mr. Chairman; you are quite correct.

Senator Simon, I am here today as a concerned citizen more than a Democrat, as a concerned citizen who questions the advisability of confirming the nomination of William Rehnquist as Chief Justice of the U.S. Supreme Court, in view of the fact that over a period of 6 years, he exerted tremendous efforts to deny people and to discourage them from exercising their most——

The **CHAIRMAN**. We are not going into all the evidence again.

Mr. **PINE**. That is the end of my response, Mr. Chairman.

The **CHAIRMAN**. OK, all right.

Any other questions?

Senator **SIMON**. If I may ask each member to respond.

Mr. **BROSNAHAN**. The only thing I would say, Mr. Chairman, is that the truth is this: When I became a prosecutor, and I was prosecutor for 5 years, I threw myself into it with tremendous enthusiasm and, during that period, prosecuted a lot of people, of whom, in Arizona, regrettably, I would guess about two-thirds were Democratic because of the registration.

And I am not here as part of any political-oriented view, but rather because, as we have gone into, I have a recollection of certain events and you have asked me to give you those. Thank you.

Mr. MIRKIN. I have not been politically active for 20 years. I am here because the committee, or members of it, asked me to come.

Mr. PENA. Yes, I am here also because I was invited to be here.

The CHAIRMAN. Mr. Smith, do you have anything to say?

Dr. SMITH. Well, yes. I am here to keep from being shamed in the eyes of my own children.

Senator DECONCINI. Mr. Chairman.

The CHAIRMAN. All right. I believe that covers--at this point now, we are ready to move on.

Senator HATCH. Senator DeConcini——

Senator DECONCINI. Mr. Chairman, I beg to indulge the chairman's patience, but let me ask Senator Pena a question

Senator Pena, it just occurred to me, based on your experience, not what you have heard here necessarily, but just based on your experience, having identified, in your judgment, that this was Mr Rehnquist that delayed the votes at Butler precinct, is that reason enough to deny him confirmation to be Chief Justice of the Supreme Court?

Mr. PENA. In my opinion, yes

Senator DECONCINI. Thank you.

Senator HEFLIN. Let me ask Mr. Pena one question.

Have you ever seen Justice Rehnquist in person and has it been pointed out to you that he is Judge Rehnquist?

Mr. PENA. No, I never have.

Senator HEFLIN. You never have seen him in person?

Mr. PENA. Other than the time that I saw him at Butler——

Senator HEFLIN. I mean since that time.

Mr. PENA. No.

Senator HEFLIN. You never have.

Senator KENNEDY. Mr. Chairman, just a one-word answer, if they feel that they can answer it.

There is one question about Mr Rehnquist's activities. I think the question is whether he personally challenged any—if you can personally state that he challenged any of the voters. I would like to just go across.

Mr. PINE. Yes, he personally challenged.

Mr. BROSNAHAN. Based on what I was told, yes.

Mr. MIRKIN. No.

Mr. PENA. Yes.

Dr. SMITH. Yes.

Senator KENNEDY. That is an issue because that is what Mr. Rehnquist's sworn testimony is, that he did not, and we have four sworn testimonies that he had, and the other affidavits, plus the other testimony of Mr. Mirkin.

No further questions.

Senator HATCH [presiding]. We will be happy to excuse the panel at this time. We appreciate your coming.

Mr. PINE. Thank you.

Senator HATCH. We will call our next witness. However we will take a 5-minute recess. We would like you Mr. Vincent Maggiore, Edward Cassidy, William Turner, all three from Phoenix, AZ, and Ralph Staggs from Coronado, CA. to take your place at the witness table.

[Whereupon, a brief recess was taken.]

The CHAIRMAN. The committee will come to order.

Mr. Bush, I understand you have to leave right away. We are going to go 10-minute rounds with members of the committee.

Mr. Bush, you may proceed now.

TESTIMONY OF A PANEL CONSISTING OF JAMES BUSH, ATTORNEY, PHOENIX, AZ; VINCENT MAGGIORE, PHOENIX, AZ; FRED ROBERTSHAW, ATTORNEY, PHOENIX AZ; WILLIAM C. TURNER, PHOENIX, AZ; EDWARD CASSIDY, PHOENIX, AZ; GORDON MARSHALL, PHOENIX, AZ; RALPH STAGGS, CORONADO, CA; AND GEORGE RANDOLPH, PHOENIX, AZ.

Mr. BUSH. Thank you, Mr. Chairman. My name is James Bush. I am a resident of Phoenix, AZ. I am a practicing lawyer there.

The CHAIRMAN. If you would all stand and raise your right hand and be sworn.

Will the testimony that you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

Mr. MAGGIORE. Yes.

Mr. BUSH. YES.

Mr. ROBERT-SHAW. Yes.

Mr. TURNER. YES.

Mr. CASSIDY. Yes.

Mr. MARSHALL. Yes.

Mr. STAGGS. Yes.

Mr. RANDOLPH. Yes.

The CHAIRMAN. Have a seat. OK. Mr. Bush, you may proceed.

And I will ask you to make your testimony as brief as you can to cover the points that you wish to convey.

Mr. BUSH. Very well, sir. As I said, I am a resident of Phoenix. I am a practicing lawyer. I have been a practicing attorney there for 32 years. I was a registered Democrat from 1943 to 1953. I have since been a registered Republican. I do not hold any office. I never have held any office in either the Democratic Party or the Republican Party.

I am a uniform laws commissioner from the State of Arizona. I was originally appointed by a Republican Governor. I have been reappointed twice by Democratic Governors.

During the 1960 and 1962 general elections in Arizona, I worked with William Rehnquist in organizing and supervising a lawyers committee to counsel and advise Republican Party officials and representatives with respect to legal questions that might arise during voting on election day.

It is my recollection that in both of those years Mr. Rehnquist acted as chairman and I was vice chairman, although I am not certain whether there was any formal title given. In any event, our functions and responsibilities essentially included the following:

To advise party officials on the appropriate credentials required for challengers and other party representatives appointed to serve at polling places on election day. In view of some of the questions that have been asked, Mr. Chairman, I might point out that the law at that time provided that the precinct committee of each party in each precinct could, by written appointment, address to the election board designate a party agent or representative and an alternate for a polling place in the precinct who could act as challenger for their respective party.

This presented some problems in some precincts in the southern part of Phoenix to Republicans, because there were not that many Republican voters, and in some cases, there were not precinct committeemen.

The attorney general in Arizona had rendered an opinion that said in precincts in which no regular precinct committee or committeeman was elected or chosen at a preceding primary the county committee could designate a challenger for the precincts without a challenger and such a designation must be accepted by the election board of those precincts and shall be allowed to act as representative of that party.

This particular issue was responsible for a number of the questions that arose on election day. In addition to that, the function of Mr. Rehnquist and myself was to brief appointed challengers and party representatives on applicable State election laws.

This was done at a meeting. We did not appoint the challengers. We did not organize the challengers, but we did have a meeting in which they were briefed as to what the applicable laws were.

We arranged for teams of lawyers to serve at the committee headquarters through election day, briefing and providing instructions to lawyers regarding their functions and their duties.

Last, we assisted the lawyer teams in researching and answering legal questions that were presented throughout the day including visitations to a polling place—if an incident occurred which seemed to require the presence of legal counsel.

The functions and responsibilities of this lawyer's committee were not those of challengers. We did not have credentials as challengers. We were not appointed to be challengers. We had the responsibilities of lawyers to answer legal questions raised by challengers, party representatives, members of the election board regarding incidents that might occur.

It is further my recollection that in both 1960 and in 1962 neither Mr. Rehnquist nor myself spent much time away from the headquarters. The majority of our time was spent there, responding to telephone calls or consulting with committee members and answering questions that came to us.

On one or two occasions, each of us left the headquarters to respond to a call regarding some question from a polling place. As I mentioned earlier, early in those elections many of the questions concerned who appointed the challengers. In some cases it was the precinct committee. In others it was a county chairman.

I specifically remember one call that called me to a polling place. It related to a marked ballot that was being displayed on the wall of a voting booth within the 50-foot limit of the precinct on East Van Buren Avenue.

Another call related to an incident in Murphy precinct where the challenger was being verbally abused because of his presence at the polling place. Other committee members made similar visits, but it was not our duty to act as challengers.

As I said, we did not have credentials, and to my knowledge no one, including Mr. Rehnquist, engaged in any challenging of voters at those two elections. During the 1964 election I worked at the committee headquarters for a portion of the day taking calls. I had no other responsibilities, but it is my recollection that the committee functions were exactly the same as they were in 1960 and 1962—that is, to answer legal questions.

I do recall that the committee was smaller and the volume of activity in 1964 was significantly less. I would be happy, Mr. Chairman, to answer any questions members of the committee might have.

The CHAIRMAN. Thank you very much. The distinguished Senator from Ohio. We are limiting questions to 10 minutes a piece.

Senator METZENBAUM. I do not expect it to go that long.

As I understand it, to your knowledge, no one including Mr. Rehnquist engaged in challenging voters.

Mr. BUSH. To my knowledge, that is correct, Senator.

Senator METZENBAUM. But Mr. Rehnquist very well could have been challenging voters when you were not present, is that not the fact?

Mr. BUSH. I cannot account for his action when I was not actually with him, but his role was that of a lawyer, and we were not about to waste legal talent sending lawyers out to do challenging work when we had other people, nonlawyers who could do that, but I cannot say when I was not there what he did.

Senator METZENBAUM. You cannot say what he did when you were not there?

Mr. BUSH. That is correct.

Senator METZENBAUM. I have no further questions.

The CHAIRMAN. Thank you very much. The distinguished Senator from Utah.

Senator HATCH. Mr. Bush, did Mr. Rehnquist ever depart from his legal duties, or did he fulfill those legal duties in a satisfactory manner?

Mr. BUSH. Yes, Senator, he did.

Senator HATCH. Did he fulfill them in a satisfactory manner?

Mr. BUSH. Yes, sir.

Senator HATCH. He did not depart from any ethical or other reasonable approaches toward the law?

Mr. BUSH. Never to my knowledge, Senator.

Senator HATCH. Did you ever receive a complaint of any kind about Mr. Rehnquist's activities?

Mr. BUSH. None whatsoever.

Senator HATCH. Not from anybody?

Mr. BUSH. Not from anybody.

Senator HATCH. Not even from your Democratic counterparts?

Mr. BUSH. I am aware of some of the testimony that has been given here, and I recall during the 1971 hearings some accounts that were made, but at the time of the elections, I do not recall of any Republicans, Democrats, officials or voters who complained of the conduct of Mr. Rehnquist.

I am a personal acquaintance of Mr. Charles Hardy. I am familiar with his role.

Senator HATCH. He was the Democrat counterpart?

Mr. BUSH. Yes, that is correct.

Senator HATCH. He is now a sitting Federal District Judge. Is that right?

Mr. BUSH. Yes, he is, Senator.

Senator HATCH. He is the one I have been quoting as saying that Mr. Rehnquist did not do these things.

Mr. BUSH. That is correct, sir.

Senator METZENBAUM. Excuse me. I did not hear what you said.

Senator HATCH. I said he was the one I was quoting. I will be happy to requote it if you would like me to. There are two quotes. They read:

> I never observed Mr. Rehnquist attempting to challenge voters at any polling place. I understand that there was testimony that he had challenged voters at Bethune and Grenada precincts. I can state unequivocally that Mr. Rehnquist did not act as a challenger of Bethune precinct.
>
> Because of the disruptive tactics of the Republican challenger at that precinct, I had occasion to be there on several occasions. The same Republican challenger was there continuously from the time that the polls opened at 6 a.m. until about 4 in the afternoon.
>
> About that time, after a skuffle, he was arrested and removed from the polling place by sheriff's deputies. Thereafter there was no Republican challenger at Bethune.

Is that in accordance with your beliefs?

Mr. BUSH. That is correct, sir.

Senator HATCH. When you received a complaint, what did you, do?

Mr. BUSH. Senator, if we could answer the question that was being presented on the telephone, we undertook to solve the incident or the question in that manner. If it appeared from nature of the question or the issue that it would be helpful to the person for one of the lawyers to go out to the polling place: we would ask one of the lawyer team members to go out there.

Now, only in the event that there was no one left at the lawyers committee headquarters; when I am talking about the committee headquarters, I am talking about this lawyers committee—only when all of the other members who were on the team were out somewhere, only then did either Mr. Rehnquist or myself go.

Senator HATCH. Occasionally you did go.

Mr. BUSH. There were occasions, I think, two or three times during the day, I recall, one or the other of us went out.

Senator HATCH. You went as attorneys, advising attorneys, not as challengers?

Mr. BUSH. That is correct, sir.

Senator HATCH. Did you ever witness then Mr. Rehnquist challenging voters or otherwise behaving in any manner that could have been construed to be improper?

Mr. BUSH. Senator, I am sorry.

Senator HATCH. Did you ever witness Mr. Rehnquist challenging voters or behaving in any manner that could be construed as improper?

Mr. BUSH. Never.

Senator HATCH. Have you ever heard of the charges made today by Mr. Brosnahan and others? Did you ever hear anybody even suggest that Mr. Rehnquist made a challenge to anybody?

Mr. BUSH. I do not recall ever having heard anybody say that we challenged a voter.

Senator HATCH. Mr. Bush, you are a Republican.

Mr. BUSH. I am.

Senator HATCH. You are Republican?

Mr. BUSH. Yes, I said I was a registered Democrat from 1943 to 1953. I became a Republican in 1953. I have been one since, but I have not held any office in either the Democratic Party or the Republican Party.

Senator HATCH. I am quite similar. I was a Democrat up until about 1960 when I changed parties.

The CHAIRMAN. The Senator from Ohio has one question.

Senator METZENBAUM. Mr. Bush, Staggs who I think was the county chairman, is that right? Ralph Staggs.

Mr. BUSH. I believe Mr. Staggs was county chairman in 1960 and also in 1962. I am not certain about 1960, but I am sure he was in 1962.

Senator METZENBAUM. He said that he advised that he dispatched Rehnquist from Republican county headquarters, located at 32d and Oak Street to go to the Bethune School and clear up the disturbance involving Benson.

He goes on to say more about that situation. But would you contradict that? Would you say that if Mr. Staggs he had sent Rehnquist out that that was not so?

Mr. BUSH. Senator, I am not aware of any telephone conversation. I do not recall any between Mr. Staggs and Mr. Rehnquist at that time. He well could have talked with him and asked him to go out there.

I would not have known about it unless I got the call, and I don't recall Mr. Rehnquist telling me anything about it.

Senator METZENBAUM. In summation, actually, you are saying to the best of your knowledge you do not know of any involvement of Mr. Rehnquist out of Bethune school but it very well could have occurred?

Mr. BUSH. I do not recall that Mr. Rehnquist was at Bethune school. He may have been, but I do not recall it.

Senator METZENBAUM. Thank you. Thanks, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman.

Mr. Bush, in 1962 was that the first formation of this type of lawyers committee?

Mr. BUSH. No, Mr. Chairman and Senator DeConcini. It was, I believe, 1960. At least, 1960 was the first time that I had anything to do with it. There may have been one in 1958 also, but 1960 was the first time I had anything to do with it.

Senator DECONCINI. And you were involved in 1960 in that committee?

Mr. BUSH. Yes, sir.

Senator DECONCINI. And in 1962?

Mr. BUSH. Yes, sir.

Senator DECONCINI. And in 1964?

Mr. BUSH. In 1964 but in a minor way in 1964. I just was one of the people who worked 3 or 4 hours during the day at headquarters.

Senator DECONCINI. In the lawyers committee?

Mr. BUSH. Yes; in the lawyers committee.

Senator DECONCINI. Did not that lawyers committee meet with the Republican designated challengers before the election?

Mr. BUSH. Yes, Senator. I do not recall whether it was the day before, or the night before election but at least somewhere 2 or 3 days before the election we met. One of the meetings was at the Women's Club in Phoenix, I do not recall, whether in 1960 or 1962. Maybe both of them were there.

We were there, and at that time, my recollection is that challengers were given a slip of paper that set forth what the grounds for challenge were that you read into the record here today.

There were some seven grounds at that time. There are no longer two of them. Betting on an election was a grounds for disqualification as well as a literacy test. But challenger were given the basis for challenge.

They were not urged to assert any challenges other than those challenges that were based upon residence, where there had been envelopes mailed, and the envelopes had been returned saying that the resident no longer lived there, or something to indicate the person did not live there.

In those instances, those envelopes were given to the challengers and they were told the appropriate method for challenging. The appropriate method for challenging was when the voter was ready to vote, the challenger would challenge, saying, Senator DeConcini is not entitled to vote because he is no longer a resident of such and such an address, and produce the envelope.

The inspector would then swear the person who had been challenged. If the person refused to be sworn, he could not vote. If the person was sworn, he was then required to answer the questions, and at the conclusion of that questioning, the election board would vote on whether or not the challenge should be sustained or overruled, and if the majority of the board sustained it, the person was not allowed to vote.

Senator DECONCINI. Now, your instruction to the Republican challengers was primarily to challenge them on this return mailing?

Mr. BUSH. That is correct.

Senator DECONCINI. Did you give them any instructions to challenge them on the English language?

Do you know if that occurred at all?

Mr. BUSH. Well, they had a sheet or a card that set forth the seven grounds for challenge. In addition to the envelopes there were as you will recall, other grounds for challenge. For example, a person who had already voted in the election, or a person who had not lived in the State for 1 year or had committed a felony were subject to challenge.

And our instructions were, if challengers had personal knowledge of some other grounds other than the returned envelope, then they should feel free to challenge.

Senator DECONCINI. And would that include the English language?

Mr. BUSH. I do not recall that we gave them any instructions with respect to that.

Senator DECONCINI. Mr. Bush, the area of your own participation, did you go to some precincts in 1962 or 1964?

Mr. BUSH. I went out to several precincts.

Senator DECONCINI. Were you dispatched by Mr. Staggs, the county chairman?

Mr. BUSH. No.

Senator DECONCINI. What dispatched you? Mr. Rehnquist?

Mr. BUSH. On the two that I got, I got a call from, I guess, the challenger or someone at Edison precinct on east Van Buren that there was a marked ballot on the voting booth indicating to voters who they should vote for.

I did not ask to go. I simply went out and found the ballot and took it off the voting booth and carried it back to the headquarters. On another occasion, I got a call from Murphy precinct that the challenger was being verbally harassed. People were saying he was not properly appointed.

I went out there personally to talk to the inspector and it was an issue, I believe, Senator, on whether this particular challenger had been appointed by a precinct committeeman or whether he had been appointed by the county chairman. It was not absolutely clear in those days, or you know, whether or not the county chairman could do it.

Senator DECONCINI. Maybe you answered this question. Were you ever with Mr. Rehnquist at any polling place?

Mr. BUSH. I do not recall that he and I ever went together to any polling place.

Senator DECONCINI. Thank you. I have no further questions.

The CHAIRMAN. The distinguished Senator from Nevada is next.

Senator LAXALT. Just a question or two, please.

Tell me within the campaign structure then or since, is there a complaint mechanism, Mr. Bush, in Arizona?

Mr. BUSH. Senator, I am not sure——

Senator LAXALT. For untoward campaign practices, was there something set up by the respective parties either by law or outside where if there was an untoward campaign practice such as an intimidating challenge that that complaint could be addressed to some group?

Mr. BUSH. Senator, only to this extent as far as I am aware. Following the 1960 or 1962 elections I think the two parties got together and sponsored legislation which cleared up whether or not a precinct committeeman or a committee chairman could appoint challengers or party representatives and how many there should be. The law was amended in Arizona to make that clear how it would go.

Also there was some clarification with respect to the process for challenging, but I am not aware that there was any other procedures set up by law or by some agreement between the two parties with respect to disputes.

Senator LAXALT. And to your knowledge, at the time of this election or any time that Bill Rehnquist was politically active in Arizona, to your knowledge, were there any charges whatsoever concerning him about untoward campaign activity?

Mr. BUSH. No, I am not aware of any.

Senator LAXALT. That is all I have now, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. As I understand it this voter challenging is susceptible of abuse by such things as lawyers being there, being recognized as lawyers and carrying some to the point the prospective atmosphere of egality. They begin to challenge people to the point where the prospective voters do not stand in the line and vote. Instead, they turn and go away.

Was there ever any instruction to endeavor to create confusion to, in effect, let it be known that there were Republican challengers there for the purpose of letting people in the voting lines know that they were being watched or that they were under some type of surveillance, or that they were suspect for being in the line?

Mr. BUSH. Senator, as I said, the lawyers committee did not have any of its members acting as challengers. They did not have credentials as challengers. Now, it is certainly true that on occasion during the day as I indicated, an incident might arise where one of us went out to a polling place.

On a couple of occasions, we met with a Democratic lawyer from their lawyers committee out there. Lawyers do argue and they get aggressive sometimes in their arguments. We have seen that. To the extent that you have two lawyers out there arguing with the inspector or the election board or someone, I suppose that somone not accustomed to legal arguments could perceive that perhaps there was somewhat of a tense environment.

But I do not know how you go about insuring that the law that the legislature has enacted, will be implemented. One of the laws in Arizona provides that it is a felony to fraudulently vote when you are not entitled to vote, and there are other reasons that prohibit you from voting. Just how to exercise and to implement those laws—whether a Democrat or a Republican—without creating an atmosphere that is going to upset voters may be a delicate one, but I think it is one of those things that has to take place and does. It may be that some voters at some time, in my judgment, misperceive discussions about a legal issue as being somewhat of a challenge when, in fact, it was not a challenge.

Senator HEFLIN. There has been a long line, at least when we started these hearings, I do not know whether there is now, of people wanting to get into this room. They had to have a desire to stand out there in line, and the chairman, if there were some vacant seats, felt very wisely and properly suggest to the police to come in, but a long line of people.

Now, as I would walk up and down, most of them look alike. I would assume that if I was in Arizona—I do not know—a group of 90-percent Hispanics, maybe a few percent Black, if I would walk up and down and see them, how would I be able to know whether the 5th one in line or the 8th in line or the 10th in line or the 27th one in line or whatever was in there, whether or not he was the one who had ever been convicted of a felony or that you could be able to find out?

In other words there might be some people in those lines that were violating the law that should not have been there and should not be there voting. But how can you find out? What is the procedure that is legal to find out, and then what is the procedure to challenge them?

Mr. Bush. I do not think you can find out, Senator, unless you happen to know by some personal knowledge other than by walking up and down. You certainly cannot determine it that way.

As I indicated earlier and as others have testified, registered letters were sent to voters in precincts, and when they came back marked: "could not be delivered", then those returned letters were the basis for challenges. Ultimately the Arizona legislature amended the law so that it provides as follows.

> Any returned U.S. mail addressed to the person challenged, the spouse of the person challenged or both, and to the address appearing on the precinct register shall be considered as sufficient grounds to proceed under this section.

That is Arizona Revised Statute 16-592.

So the legislature made it a law. That is established. That constitutes a reasonable grounds for challenge.

Senator Heflin. I am trying to distinguish what is legal and legitimate, in my mind, and what is illegal. You have a line of people. A great number of them look alike. How do you know that one in that line or those two or three or four? How do you find out?

Suppose you were there as the challenger. Is the procedure to go out there and just try to create a turmoil—to, in effect, cause people to leave because they do not want to stand in line, number one, and number two, because maybe they are suspicious and maybe they have some fear of authority?

I am trying to distinguish what is legitimate inquiry of how you proceed. I suppose you challenge by going inside and you go to this polling judge or whoever it is and say, "I challenge him", and you get his name and you vote. I suppose he votes under protest, and then he can take an appeal or whatever happens.

But how do you pick him out?

Mr. Bush. Well, that is the way we instructed the challengers to do it, Senator, in Arizona. There is a precinct register, and your name is there and a number. When the voter comes up and gives his name, one of the clerks will check and look for that name.

Our instructions to our challengers, were not to be outside the polling place roving up and down the lines. They were to be and entitled to be present inside. When a voter gave his or her name, for example: "Jim Bush, and there was an envelope addressed to Jim Bush, marked "returned" or no longer resides here", then the challenger was instructed at that point to say to the inspector, I challenge Mr. Bush's right to vote on the basis that he is not a resident of the precinct and produce the returned envelope.

That was the type of instruction we gave, and to the best of my knowledge, that was the basis for challenges. I am not aware, as has been testified to here, of people walking up and down the line and saying "Are you entitled to vote? What is your name?" I never heard of anything like that. Nothing like that ever came to my attention.

I was not everywhere so I cannot say that it did not happen, but I am certainly not aware of it.

Senator HEFLIN. Well, did you have prepared cards that they could take around and show to people that would have something on them? Were cards ever prepared with any written material on them, such as excerpts from the Constitution?

Mr. BUSH. No.

Senator HEFLIN. In your Republican headquarters did you prepare provisions of the Constitution with regard to being able to read and interpret it? What are all these grounds, Dennis? You have something about the Constitution.

Senator DECONCINI. I do not have it right here. I will get it for you.

Senator HEFLIN. To assist challengers, did you have anything prepared for challengers on any of the grounds that are listed under the statute?

Mr. BUSH. Mr. Chairman and Senator, we provided at this training session or school for challengers material taken directly from the statutes. For example, Arizona revised statutes 16-921 listed seven grounds for challenging voters.

I do not recall whether the material was a Xerox copy of the statute book or whether it was reproduced on a card, but certainly the lawyers committee did not prepare any card that had a portion of the Constitution on it that was distributed to challengers and said use this for testing somebody's ability to read the Constitution. We did not do anything like that.

Senator HEFLIN. Let me see if somebody has a copy of the Arizona statute. All right. Of course, you have challenge one that he is not the person whose name appears on the register. Well, if he does not appear on the register I suppose there is no way he could vote. That is an automatic challenge.

Mr. BUSH. Well, my name might be on the register, but the person who showed up claiming to be me might be known to the challenger to not be me.

Senator HEFLIN. In other words, he might be a different person.

The CHAIRMAN. Senator, your time is up.

The distinguished Senator from Illinois.

Senator SIMON. Mr. Bush, just one question. As you recall, did you and the then Mr. Rehnquist ever have any discussions along the line we got to keep black voters off from voting; we got to keep Hispanic voters from voting? Were there discussions like that at all?

Mr. BUSH. Senator Simon, we never had any discussions like that.

Senator SIMON. I thank you. I have no further questions, Mr. Chairman.

Senator BIDEN. I would like to ask a question. I apologize for not being here but I caught——

The CHAIRMAN. The distinguished ranking member.

Senator BIDEN. I caught the tail end of Senator Heflin's questioning on the television, but I did not get to hear the answer and I apologize. Sir, I apologize.

Your name?

Mr. BUSH. Bush, Jim Bush.

Senator **Biden**. Mr. Bush, when I last turned off the TV, Senator Heflin had asked you, as you are going down the line, how do you tell whether or not someone is qualified to vote or not qualified to vote? What was your answer?

Mr. **Bush**. My answer was I do not know of any way you can tell by going up and down the line whether somebody is qualified to vote unless I lived in the district and saw you in line and knew that you lived in another precinct. This raises an inquiry of why would you be in there? Outside of that, I do not know.

Senator **Biden**. Now, when the Arizona Legislature changed the law, which they did, relating to the sending of a registered letter, and I believe you quoted the law. Would you quote it again?

Mr. **Bush**. Yes, sir; it provides that:

> Any returned United States mail addressed to the person challenged, the spouse of the person challenged, or both, and to the address appearing on the precinct register shall be considered sufficient grounds to proceed under the section.

It does not mean the person is disqualified. But it is sufficient grounds to have him sworn and answer questions about it.

Senator **Biden**. Now, was it reasonable or unreasonable to conclude from that that the prior law had a similar requirement relating the grounds upon which one could proceed?

The dilemma here is that I am a little confused about Senator DeConcini raised earlier is that the law was obviously obnoxious. Eventually, the legislature concluded the law was obnoxious, requiring people to have to read. But the debate and the uncertainty—and I would ask of you gentlemen to respond to this—the debate—the discussion here has been whether or not there was an understood implicit and/or statutory provision that set grounds upon which you had to establish first, before you could proceed to challenge. Follow what I am trying to get at?

Now, was it, in your opinion, legal under the old law to walk up to someone whom you had never seen before, had no notion whether or not they could or could not read, and say, "read this card" ? Was that a legitimate challenge or an illegitimate challenge under the old law?

Mr. **Bush**. Senator, let me respond to it this way. If I were a challenger, and that provision was still in the law, and I sought to use it—although I agree with most of you, it was repugnant to me, I would not use it. But assuming I did, the method that I would use to do it would be as follows: When you gave your name, Mr. Biden, such and such an address, I would say, "I challenge Mr. Biden on the grounds that he cannot read, or that not being prevented by physical disability from doing so, he is unable to read the Constitution and the language in the manner as to show that he is neither prompted nor reciting from memory." That is what I would say to the inspector. Whereupon, under the former law, the inspector would be required to ask the party challenged to read any section of the Constitution designated by the inspector and may be required to write his name. That is what the former law said, and that is the way you whould challenge for that provision—paragraph 7 of A.R.S. 16-921.

Now, you would not be out on the grounds somewhere saying, "I challenge your right to vote because you cannot read." You would wait until the person got inside, ready to vote. Then the inspector would tell you.

Senator **BIDEN**. I see.

As the person ready to vote, you need not have anything other than a hunch that I might not be able to read under the old law?

Mr. **BUSH**. I suppose that is right.

Senator **BIDEN**. Have any of you gentlemen ever challenged a voter under the old law as to wether or not they could read?

Mr. **BUSH**. I have never challenged a voter, period.

Senator **BIDEN**. Thank you. No further questions.

The **CHAIRMAN**. The distinguished Senator from Massachusetts.

Senator **KENNEDY**. I have no questions.

Senator **HEFLIN**. I have a question.

The **CHAIRMAN**. Mr. Bush has got to catch a plane. You can ask him now so we can——

Senator **HEFLIN**. All right, I will do it.

Mr. Bush, this statute says, "is unable to read the Constitution of the United States in the English language."

Now, assuming that a great number of people in these districts were Hispanics, if you could determine that they could not speak the English language, you had a pretty good leg up on the challenge that they could not read the Constitution in the English language.

Were there efforts being made to determine as they were in the line, or wherever they might be, or were instructions given to determine whether or not they cannot speak English first?

Mr. **BUSH**. Mr. Chairman, Senator, the issue or question of how to deal with it never came up before the Lawyers Committee, because we were not asking anybody to challenge people on that basis. And I agree you have a problem. If one cannot speak English, how can you be sure one can read it? We just never dealt with that, because we never tried to—gave any instructions to people to challenge on that basis.

Senator **HEFLIN**. You never had any cards printed up or anything to pass around for somebody to flash to them; it is—says something like $10 is available to you in the car across the lot, or something like that, you know, where——

Mr. **BUSH**. Senator, the Lawyers Committee, of which Mr. Rehnquist was chairman and I was vice chairman, never printed up any material like that, and I never saw any material like that from any other source.

If someone had such a card, they could have typed it up on their own, but I never saw any official card like that.

The **CHAIRMAN**. Any more questions?

If not, we are going to release Mr. Bush. He has got to catch a plane.

Mr. Bush, you are now excused.

Mr. **BUSH**. Thank you very much.

The **CHAIRMAN**. Now, would the other three gentleman from Arizona come up to the table? We are going to get all of you up at one time.

Now, we are going to hear statements from all of you, and then we are going to question you.

Now, we have—those against Mr. Rehnquist this morning and this afternoon have spent 9 hours. Originally they were to have 4, but we tried to be as lenient as we could.

Now, those that are for him, as I understand, you will testify more or less for him, we have been going only 30 minutes. But there is no reason to take too much time. If you will present your statement briefly, succinctly and then your questions, and we will allow 10 minutes to each member of this committee to question.

Now, the first is Mr. Maggiore. Mr. Maggiore, do you want to proceed?

STATEMENT OF VINCENT MAGGIORE

Mr. **Maggiore**. Yes, sir. My name is Vincent Maggiore.

The **Chairman**. Will you speak out now so we can all hear you?

Mr. **Maggiore**. Can you hear me?

I am a native of Ohio. I have lived in Arizona for the greater part of my life, since 1954. I graduated from Ohio State, undergraduate, and I attended Georgetown University Law School.

After graduating from Georgetown, I went to Arizona, and I waited and then passed the bar. I went to work for Ambassador Mahoney in the county attorney's office. But prior to that, I had spent a little time in private practice in Scottsdale, AZ. Then I went to work for the county attorney. And after being there for a period of some 3 years, where I became the chief deputy prosecutor, I then went to the attorney general's office. I stayed there until 1960, and I decided to run for office. I did not win. And that was the last office I attempted to run for.

At the same time that I was losing the county attorney's office, I guess some of the people felt sorry for me, and they elected me precinct committeeman. As precinct committeeman, in the latter part of 1960, I was elected by the committee as the county chairman, the Maricopa county chairman. As the county chairman from late 1960, I was reelected in 1962, and I was the county chairman that was in office at the time all of the problems that you are facing came into being.

I stayed county chairman until 1963. I had resigned at the death of President Kennedy. Senator Hayden requested that I be reelected for a period of time so that a Thomas Murphy could be elected as the county chairman.

At the time I was county chairman in 1962, I was the culprit that caused all of your problems today. I have been a lifetime Democrat, and at the time of the problems as to voting with minorities, and Bethune was caused by me, I thought, as a matter of fact at that time, that there was a little too much activity in the precincts, and I was the one that called the U.S. attorney's office, or I had called the U.S. attorney. I had quite a few assistants at that time. And I am the one that had caused the action that was taken by the U.S. attorney's office.

During this period of time, and I appreciate the seriousness of this today, at no time did anybody come to me and state that Justice Rehnquist had committed any of the acts that I have heard for 2 or 3 days. I feel that I was the party leader—we were not an affluent party, by the way, gentlemen—but I was the party leader and, for sure, all of these things should have come to me.

After the incident in Bethune, I realized that I was not going to get anything done as far as action by the U.S. attorneys office or action by the sheriff or the—and the police were called also. I felt that I was not going to get anything done.

I think Senator Hatch had stated about certain people that went and took care of the action themselves, as far as this Benson was concerned.

I had some knowledge of the Republican organization, and as far as I can recollect—and I hope you realize that after 25 years it is very difficult to recollect each and every thing that occurred at that time. Too many things have passed.

But what I do recollect was that after Benson was taken care of—and there was a little battle, and I may be—I hope the statute of limitations is broadened, because I may be the one that caused that battle to take place. I told some of my assistants to go and help out, to clear up the situation in Bethune.

I was at Bethune two or three times that day, and I was at other precincts where I thought this activity was not in accordance with the law. During all of this time, I never saw Justice Rehnquist there. I never saw him at any of the other precincts, either.

I came here because of the fact that the FBI had questioned me, and they questioned me back in 1971, also.

In regards to some of the mistakes that were made, which I hope you all understand—and I'm sure you're understanding Senators—that some of the mistakes that were made as regards the particular county headquarters, the county headquarters we had at the time I first took office as county chairman—a nonpaying position, by the way——

The CHAIRMAN. Mr. Maggiore, we appreciate what you're saying, but I'm wondering if you could come right to the point concerning Justice Rehnquist. We have other people here to hear——

Mr. MAGGIORE. I have just one more thing to state.

The CHAIRMAN. Let me ask you this. Did you know Justice Rehnquist at that time?

Mr. MAGGIORE. Yes, I did. A casual acquaintence, as an attorney.

The CHAIRMAN. And you were the Democratic chairman at that time?

Mr. MAGGIORE. I was the Democratic Chairman, yes, sir.

The CHAIRMAN. Is there anything you can tell us about him, anything he did, that was improper, unethical, anything of that kind that you know of?

Mr. MAGGIORE. If he did something, it was out of my knowledge at the time, and I was present all day when this occurrence supposedly had taken place.

Let me go a little further. I stopped—shortly afterward, I think it was no more than 1 or 2 days after the incident took place—and I was a little disturbed because I thought the law was archaic and there was really no way you could prove, except from a factual way, whether somebody was violating the civil rights of our citizenry. I'm still bothered by it.

So I stopped—I had written a letter—it's in your record—I had written a letter to the Republican chairman, State chairman, and a copy to Mr. Staggs, and I stated that I was bothered about this procedure because of our position, where we had a lot of minorities in the Democratic party. I thought that something should be done and that we should get together.

A couple of days after the election and the incident in Bethune, I stopped Justice Rehnquist in the street. I told Justice Rehnquist that I was a little disturbed because I felt that there was some deprivation of certain peoples' rights.

Justice Rehnquist—and I'm paraphrasing it—stated at that time that he agreed with me, that there should be something done in regards to protecting people's voting rights, that they were very important.

That's my statement, Senator.

The CHAIRMAN. Thank you very much.

Mr. Cassidy, would you tell us what you know? All of you have been here during this hearing, haven't you?

Mr. CASSIDY. Yes, sir.

The CHAIRMAN. So you know the issues here. It is concerning Justice Rehnquist. Just as briefly as you can relate anything that pertains to that would be helpful.

STATEMENT OF EDWARD CASSIDY

Mr. CASSIDY. My name is Ed Cassidy. I retired last year from the Phoenix police department after 29 years. I spent November 6——

The CHAIRMAN. Speak into the microphone as close as you can.

Senator METZENBAUM. Could you start over again? I didn't hear what you said.

Senator LEAHY. Just pull the mike closer to you.

Mr. CASSIDY. My name is Ed Cassidy. I retired from the Phoenix police department last year, after 29 years.

I don't know the Justice, but I did spend all of November 6th, 1962, the election day, at Bethune School. I was called into the school twice over disturbances. Both times a Mr. Wayne Benson, the Republican challenger, was less than tactful—guess that would be the way to describe him. This resulted in arguments with the Democrats that were there. It was over the literacy test. He wanted them to read a portion of the Constitution.

By about 1:30, 2 or 3 o'clock in the afternoon, following the last disturbance, where he alleged he had been assaulted, he asked me for protection to his car. I took him to his car and followed him out of the area, and with him went the problem.

At no time did I ever hear the Justice's name mentioned. I heard no problems regarding anyone, no arguments down there with anyone, except Wayne Benson and the two Democratic challenges.

That's all, sir.

The CHAIRMAN. Let me ask you, did you see him or know anything that he did that was improper?

Mr. CASSIDY. I wouldn't have known him, sir.

The CHAIRMAN. And you had no complaint about him?

Mr. CASSIDY. None whatsoever.

The CHAIRMAN. Mr. Turner, would you please make your statement. Speak into the machine so we can all hear you.

Mr. TURNER. Thank you, sir.

Mr. Chairman, I have lived in Phoenix, or the Scottsdale area——

Senator METZENBAUM. What's your name, sir?

The CHAIRMAN. William Turner is his name.

Speak loud, Mr. Turner, into the machine.

STATEMENT OF WILLIAM C. TURNER

Mr. TURNER. My name is William C. Turner. I have lived in Phoenix or Scottsdale, AZ since 1953. Most of that time, I have served as head of a firm of international management consultants, except for the period 1974 to 1977, when I served as the American Ambassador to the OECD in Paris.

During the period from approximately 1955 to 1965, I was reasonably active in the Republican Party and held a number of party positions. Mr. Chairman, Mr. Gordon Marshall, who is also a member of this panel, joins me in this statement.

During the 1962 general election, at the request of the Republican county chairman, Gordon Marshall and I organized a group of Republican volunteers to serve as poll watchers, or challengers, as described in State statutes, in some of the heavily Democratic precincts in the Phoenix area. This followed what we recall being more limited but similar efforts in 1958 and 1960.

A committee of lawyers was also formed by William Rehnquist and Jim Bush, who you just heard, to provide legal counsel and support of poll watchers and other Republican election officials as requested.

Shortly before the election, an evening meeting was held at the Phoenix Women's Club, in which the poll watchers and members of the lawyers committee were briefed by Mr. Rehnquist and Mr. Bush as to their legal rights and responsibilities in challenging unqualified voters under the Arizona statutes.

A central telephone number was given to each volunteer so they could contact committee members for advice or assistance, if required. They were also given appropriate credentials, signed by the Republican county chairman, as official Republican challengers.

On election day, Mr. Marshall and I periodically visited some polls in which difficulties had been reported. The balance of the day was spent at county headquarters. We also met and talked with various members of the legal committee, including Mr. Rehnquist, at Republican headquarters, as well as at some of the polls as they were dispatched to deal with problems during the course of the day.

Bill Rehnquist's job was to organize and supervise the legal committee. It is our recollection that he accompanied us to a few of the polling places where problems were reportedly occurring. This was for the purpose of advising poll watchers and other Republican election officials of their rights when their work of challenging unqualified voters was impeded or credentials questioned by Democratic election officials, or by attorneys from the Democratic county committee who were functioning in a similar capacity for that party.

To the best of our recollection, at no time in our presence, or in the reports of anyone talked with that day, did Bill Rehnquist or any other attorney on the committee, for that matter, assume the role of challenger or engage in harassment or intimidation of voters. Their mission was to assist their Republican poll watchers and other election officials in carrying out their responsibilities of challenging unqualified voters, principally on the basis of residence or valid registration.

Since the unaccustomed sight of Republican poll watchers was quite unwelcome at some of the heavily Democratic precincts, there was considerable tension and stress. This resulted in occasional confrontation between Republican members of the legal committee, poll watchers and other election officials, with their Democrat counterparts. The Republican effort was successful and a substantial number of unqualified voters were effectively challenged, principally because they did not meet residency requirements or had invalid registration.

To our knowledge, there was no formal protest by the Democrat Party organization or by any individual voters to the county attorney, who was also a Democrat, concerning the conduct of any Republican poll watcher or attorney on that day, including Mr. Rehnquist. If there were any unreported expressions of concern at that time, some 24 years ago, when memories were still quite fresh, the county attorney was apparently not sufficiently impressed with their credibility or merits to take any action.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Ralph Staggs.

Mr. STAGGS. Is this one on?

STATEMENT OF RALPH STAGGS

I am Ralph Staggs, a semiretired homebuilder from Phoenix, AZ, a native Phoenician. I have held considerable offices in—organizational offices—in the Republican Party in Arizona since 1952, up through precinct committeeman and including 4 years as a Republican national committeeman.

I would like to state for the record that I have known Associate Justice Bill Rehnquist politically since late 1959, and in my opinion, there is not a more honorable man in my total acquaintances than William Rehnquist.

I have never observed any remote biases or prejudices by Bill Rehnquist during his political and social activities that I'm aware of.

I would like to state that I have no information in regards to the 1960 general election, the November general election. I do have information on the 1962 November general election, as I was Republican county chairman for Maricopa County at that time.

I have no information as to the activities of the November general election in 1964.

On November 6, 1962, I was Maricopa County Republican chairman of the Republican party. I would like to point out here, because of historical practices by the Democrat Party to vote tombstones, to vote voter registrations from vacant lots, empty houses, and moved-out residences, the State Republican Committee instructed all county chairmen to set up a program to prevent illegal and/or fraudulent voting. I would be glad to describe that later.

Senator BIDEN. Are you from Chicago or Phoenix?

The CHAIRMAN. Senator, he has a right to——

Mr. STAGGS. I am not from Cook County.

In establishing this voter security at the Maricopa County level, we established a vote security committee, better known as the challengers committee, made up of two parts. As Bill Turner has stated, he and Gordon Marshall were chairmen, cochairmen, of the challengers committee. Bill Rehnquist was appointed as chairman of the legal committee, and Mr. Bush was vice-chairman.

On November 6, Justice Rehnquist was not a member of the challengers committee, and to the best of my knowledge, never was involved in any actual challenging in any of the precincts in Maricopa County, challenging any voters. His duty, as has been stated, was chairman of the legal committee, to give advice to the challengers and other precinct workers. That legal committee, as Mr. Bush stated, had 12 lawyers that roamed Maricopa County that day.

On November 6—they gave legal advice to the precinct workers in reference to the Arizona State statutes and the Federal Constitution.

On November 6, 1962, Bill Rehnquist was sent down to the Bethune precinct at my instructions. He was in county headquarters with me most of the day. However, he was sent down to the Bethune precinct, I believe some time after lunch, to clear up a problem that had been reported to us from that precinct, that voting precinct.

The illegal and fraudulent voting occurred because registered lists—and I want to point this out emphatically. The reason that this challengers committee had to be established was that in Arizona the voter registration lists never got purged of illegal voters from year to year, from election to election. In 1962, there could have been names registered on the voter registration lists that had been on there for 20 or 30 years. Persons could have died, and did, and had. People had moved out of the voting precincts, where their name appeared on the voter registration lists. Houses had been removed, torn down, burned down, et cetera. There were names on the voter registration lists at vacant lots and so on. This is the reason that a challengers committee was necessary to be established.

As has been stated earlier, the method used was to send out a first class mailing letter with political information in it, with an address return requested. All of those letters that were returned as undeliverable for any reason were segregated by the voting precinct and given to the precinct captain. That was the basis for the primary challenge.

After the November 6, 1962 general election, with the help of Bill Rehnquist, who, incidentally, prior even to him chairing the legal committee, was also legal counsel for the Maricopa County Republican Committee and was on our executive committee at that time. But after the 1962 election, Bill Rehnquist, with the help of my good friend, Democrat County Chairman Vince Maggiore, who just testified, determined that it was time for the legislature to correct this law that did not permit purging of dead names on the registration list.

So I don't recall how long it was, but it was within 2 or 3 years after that that we finally convinced the legislature to pass a law to purge the voter registration lists after every election every 2 years.

This got those fraudulent names off of the registration list and it became almost unnecessary to challenge any voters.

Also after that—and again, I don't know the timing--but the Arizona Legislature passed a law that the ballots be printed in Hispanic, in Spanish, to assist and aid the Spanish minority voters. This also was done with the cooperation of the Democratic Party.

That pretty well covers my basic statement, except that I would like to read from an article that appeared in the October 25, 1962 Phoenix Gazette, which is the afternoon paper in Phoenix. It is headlined:

> GOP Plans Unusual Measures to Get Heavy Vote. Unusual measures to get out heavy vote and to guard against violation of election laws will be used this year. To put it bluntly, we will be guarding against possible election fraud and so on. Especially in Maricopa County, extra efforts will be made to challenge those not legally qualified to go to the polls and attempt to cast ballots. "We will not try to prevent anyone from voting who is qualified legally to vote", stated the State Chairman. "On the contrary, we are doing all we can to encourage the biggest possible turnout. On the other hand, we anticipate that certain attempts will be made to capitalize on apparent voter apathy. This could take the form of persons trying to vote under assumed names—" which they did "—or to vote when they were barred by the Constitution or the State laws for any reason."

That appeared 2 weeks before the general election of November. 1962.

That's the end of my statement, Mr. Chairman.

The **Chairman**. Thank you.

Mr. Fred Robertshaw.

STATEMENT OF FRED ROBERTSHAW

Mr. **Robertshaw**. Mr. Chairman and members of the committee, my statement will be cumulative to that of Jim Bush, and I think will be much shorter than the other gentlemen here.

I am a lawyer and have been practicing law in Phoenix, AZ for 25 years. I, in 1962, was on this lawyers committee. I think that's the reason why whomever called me wanted me to come. I was not a chief like Bill or Jim Bush, but I was an Indian. I think the people who had me come here want me to tell you what we did.

I said, "Bill, what do I do, being on the lawyers committee in this election?" He said, "Bring the code book down to the county headquarters and read the code and answer questions from people at the precinct level who will be calling in to ask you what the law is."

Most people don't like to read the dry prose that we lawyers have to, and so I guess that was basically our instructions and that's what I did.

I know that I was not an officially designated challenger, and I don't believe that anybody else on the lawyers committee, of whom Bill Rehnquist was one and Jim Bush was one, were designated election officials, either. I think our scope, as I recall it—and this was 25 years ago—was simply to read the code and advise people, first over the phones when they called in, whether they were a designated challenger or an election official from a party, whomever. That's what I know I did.

I think one time I went out to a precinct and read the code to somebody, and they said, "Gee, that's the law" and that was that.

So, I hate to be too brief, but I'm afraid that's all I can recall now, other than to eminently commend Bill Rehnquist and urge you to please confirm him, as he is one of the finest lawyers that I have ever had the good fortune to have anything to do with.

Thank you.

The CHAIRMAN. Mr. Gordon Marshall.

STATEMENT OF GORDON MARSHALL

Mr. MARSHALL. Yes, sir.

Mr. Chairman and members of the committee, you have heard the statement read by Mr. William Turner relative to our activities as cochairmen. We were the other side of the coin, if you will, in that we recruited and placed challengers, following their instructions. During election day we traveled from poll to poll to see that they were in place and to see if we were able to lend them any sort of assistance.

I have lived in Phoenix since 1956, as a corporate officer of a corporate business there. I have since retired, or semiretired, as Ralph and I prefer to say.

I would like to just take my few remaining minutes to again commend to this committee a man I have known for 25 years, as a friend, companion, a devoted father, a partner of mine and Mr. Turner's, a man without malice or animosity, a gentle person full of consideration for his fellow man.

It seems to me utterly inconsistent, with the man that I have known, and his character, that he has committed some of the acts I have heard ascribed to him in the last few days. He is not a man who intimidates, threatens, or harasses.

Thank you very much.

The CHAIRMAN. Mr. George Randolph.

STATEMENT OF GEORGE RANDOLPH

Mr. RANDOLPH. My name is George F. Randolph, Mr. Chairman and members of the committee. I'm a native Arizonan, I've been an Arizona lawyer for 33 years. I have been licensed to practice before the U.S. Supreme Court for 29 years. I was Senator Goldwater's legislative assistant and counsel to the Senate Labor Committee from the years 1957 to 1960, so I have a little knowledge of your procedure here.

I was involved in the Republican challenging program in the years 1960, 1962, and 1964. I was one of the lawyers that participated in the advising of the poll watchers and of the challengers in those years. I have known Justice Bill Rehnquist since 1952, when he came to Phoenix.

In 1960 it wasn't clear that we prohibited the challengers from using paragraph 7, of ARS § 16-921, and we did permit the challengers, upon occasion, if a voter couldn't read or write the Constitution, to ask the board to challenge the voter on that basis. That's my best recollection. I don't think we favored it at all, and it was rarely done.

But in 1962 and 1964, the night or so before the election, Bill Rehnquist and Jim Bush conducted a school for challengers--at which there were probably 25 or 30 of us at least, and we were given a kit and a copy of the statute and told how to challenge the voters. And we were also, the challengers in this group were given boxes of envelopes which had been sent to registered voters on the day after the registration had closed. These letters were sent through the post office with orders to the postmaster: Do not forward. And there were a great many of them that came back. We sent them to selected precincts, to all of the registered Democrats in those precincts.

At the challenge school we designated the challengers who were going to be in the various precincts—and I brought an official Maricopa roster of all the precincts with us, so if you have specific questions about specific things, which I will discuss in a minute or two, I can just discuss pretty much any precinct because I know them all pretty well.

Now, the challengers were given those envelopes—from 1962 and 1964—these were the years that we have had the greatest deal of testimony on—and told that they were to take the credentials that they were given, where they were certified challengers, to the various polls and try to get there at 6 o'clock in the morning and locate a telephone. The reason for that is that we knew there would be some problems, and we wanted to be sure that they knew how to get in touch with us as quickly as possible. Also by use of the telephone, of course, they would be able to call Justice Rehnquist and Jim Bush at headquarters to take appropriate action for any problems that might arise.

On each election day in 1960, 1962, 1964, I arrived at the Republican headquarters and was assigned as a member of two pairs of lawyers—there might have been more, but there were two pairs of lawyers that were furnished automobiles with telephones. And our duties were to go to the polling places where there were problems and resolve them without creating delays or harassment or any interference with the voting process.

On election day morning in 1962, the election board refused to allow Republican challengers to challenge voters in Monroe precinct. That's one you haven't heard about. My partner and I were dispatched to resolve the issue. While we were explaining the law to the board, a Democrat lawyer by the name of Herb Finn came in and stated in a loud voice that I was disturbing the election—I was delaying it a little bit because I was talking to the board and explaining what the statute said and——

Senator HEFLIN. You say you were talking to the what?

Mr. RANDOLPH. The election board, Senator, the election board consisting of the chairman and the two other parties on the board who would certify the voters as they came in and allow them to vote. And those people had to make a decision at any time a challenge was made as to whether the voter had moved from the precinct or was otherwise an unqualified voter. I think you went into that a little bit in the——

Senator HEFLIN. Was one of those what you would call a polling judge?

Mr. RANDOLPH. Yes, sir, the chairman would be the judge. There was also other parties called the marshal and the inspector. The marshal was supposed to take note of any illegal activity and cause it to be discontinued by either calling the police or getting it to be corrected.

But, at any rate, our instructions were—all of us at that school—were to address any problems to the board; we were not to, under any circumstances, interfere with any voter. And that was true from 1960 through 1964.

So some of this testimony that has come in is kind of surprising to me, because it was directly against the instructions given by Jim Bush and Bill Rehnquist.

OK, on this day, Herb Finn came in and said that I was interfering, and he said he was calling the police and was going to have me arrested for interfering with the election, for a felony. I got to the phone and I called the deputy county attorney for the elections, whose name was Jane Greer—and that name is in that article that you have, Senator Hatch, that you read. In 1962 we had the good fortune that she came right down—and she's a very level-headed attorney, and she made the decision at that time, because it was a little unclear as to who should be seated—but she said there is only going to be one here, and we'll seat one challenger from each party and the rest of you all get out. And then Herb Finn and I and Jane left the polling place and things all quieted down and everybody voted.

Now, Jane—I asked her then, would you join us for the rest of the day—which she did. So we thereafter took off and we went down to a precinct by the name of Skiff, where a report had come in on the telephone that there was a problem: they refused to seat our challenger and various other things. I'll go into this just a little bit from now, but to help you identify it—this was about 10:30 in the morning—this polling place was in a school that had a large common area out there, and they were voting in the cafeteria, and from as nearly as I can tell this is the polling place that Mr. Brosnahan was describing earlier today. It was definitely not Bethune. And they did have problems at Skiff, and it's my belief that that is where he went.

Now, why he had to go there and interfere with that election was beyond me, because at 10:30 a.m. Jane Greer had it all straightened out, and she'd taken anybody else that——

Senator **Biden**. Do you know for a fact that this is the polling place he was referring to?

Mr. **Randolph**. I was there.

Senator **Biden**. No, no, I'm asking the question: Do you know for a fact that this was the polling place that Mr. Brosnahan was talking about?

Mr. **Randolph**. Well, Senator, I have done this for so many years, and as a roving member of this committee I have been to every precinct down there, and this is the only one that I can figure that fit the problem that (*a*) it had a problem, (*b*) it had a large common area where they entered, and (*c*) that they had a large cafeteria where they were voting.

Senator **Biden**. I don't remember him saying that; I was the one that said that. I was the one talking about—that's what I'm trying to get at: I was the one describing what polling places in Delaware looked like. I said cafeteria, table, large place in the back—was it like that, and he said he didn't know.

Mr. **Randolph**. Well, sir, I was watching this—and I echo your remarks, that's what is commonly a place of voting. But this is the only one that Mr. Brosnahan, I believe—he either subscribed to your remarks or he described this polling place as I have described it. And that is my opinion that that is where he——

Senator **Biden**. Your opinion.

Mr. **Randolph** [continuing].—And the FBI man went after we got it all straightened out early in the morning. They didn't always stay straightened out, please believe me—there is that possibility.

From there we went to Bethune, the famous Bethune, and there they were having trouble—this was 1962, and it was Mr. Bentson—B-e-n-t-s-o-n—and as we entered there, there was a milling crowd and it was ugly, and they didn't like Mr. Bentson at all and they were trying to get him out of there one way or the other. And Jane, with the help of the police, got it straightened out.

Mr. Cassidy, I don't know whether you were there or not at that point. You probably were.

[Mr. Cassidy nods in the affirmative.]

And so I was glad to get out of there.

In 1964, John Stiteler was the challenger in Bethune, and he called and said that they wouldn't seat him. So I again had a partner and a telephone car, and down we went to Bethune, and we had proper credentials as the party representatives to enter the polls. And so it was crowded and there were several very unfriendly black men that attempted to keep us from entering. We called the police, order was restored, John was seated and successfully challenged statutorily unqualified voters that day—and there may have been some blacks, there may have been some Hispanics, and there may have been some whites. But they were treated equally. If they had moved from the precinct and the envelope had been returned, John challenged them, and the judges, for the most part, operated within the law and disqualified unqualified voters.

So as I left somebody said: "you and your partner may be lucky to get out of here alive, but your friend may not be so lucky."

So I stopped, I went back in the polls and I said, "John——

Senator **Biden**. Excuse me one second, Mr. Chairman.

The **Chairman**. The ranking member has to leave, would you mind if he——

Senator **Biden**. If I can ask one question, because I am confused. Mr. Staggs, I'd like to ask you a question, if I may.

Did I understand your testimony to say that you were the one that sent Justice Rehnquist to the Bethune polling place to straighten things out?

Mr. **Staggs**. Yes; I was in county headquarters most of the day that day, and Bill Rehnquist was in county headquarters most of the day. And when the call came in, he was the only one, as I recall, there, and he was chairman of the legal committee, so he was dispatched down there.

Senator **Biden**. Now I am confused, because on November 17, 1971, you in a sworn affidavit said the following:

> I further hereby certify, to the best of my knowledge, that Mr. Bill Rehnquist, on general election day, 1962, was nowhere in the vicinity of the Bethune precinct when this activity occurred, nor any time during general election day.

Mr. STAGGS. Yes, sir, Senator, if I may clear that up.

Senator BIDEN. I'd like you to.

Mr. STAGGS. This memo was dictated within one hour from the time I talked with Bill Rehnquist in Washington, DC, on November 17.

Senator BIDEN. November 17, 1971?

Mr. STAGGS. 1971, in reference to an article in the newspaper where he was being criticized or challenged on his original appointment as Justice on the Supreme Court.

Senator BIDEN. This is a sworn affidavit.

Mr. STAGGS. Wait a minute—may I finish?

The CHAIRMAN. He's explaining.

Senator BIDEN. Oh, I'm sorry.

The CHAIRMAN. Go ahead and explain it.

Mr. STAGGS. This was dictated within 1 hour because a U.S. Marshal was coming to pick it up, and I dictated this from a newspaper article that I have turned in here of November 7, the day after the 1962 general election, which indicated no presence at the Bethune precinct of Bill Rehnquist, only Wayne Bentson.

And I dictated this from that newspaper article.

In checking our files, 2 or 3 days later I corrected this and mailed a corrected statement that apparently did not get into the file because the hearing was over.

Now, when the FBI interviewed me on this last occasion, I was in San Diego; they called me and they said they had this statement; I said that is incorrect. And I gave them a corrected statement again last Monday morning July 28, 1986, in San Diego, and that is in the record.

Senator BIDEN. Now, did Mr. Rehnquist in 1971 call you and ask you to swear to this statement?

Mr. STAGGS. No. I saw the article in the newspaper.

Senator BIDEN. I thought you said you got a call from Bill Rehnquist.

Mr. STAGGS. No, I said during a call with Bill Rehnquist. I read the article in the Arizona Republic.

Senator BIDEN. I just want to get the facts straight now. During a call from Bill Rehnquist—so Bill Rehnquist called you?

Mr. STAGGS. No, I called him. After reading an article in the Arizona Republic in Phoenix that he was being accused of this—and at the time he was also being accused of being a member of the John Birch Society, which I knew he was not, but this Wayne Bentson who was done there was——

Senator BIDEN. I'm just trying to establish who called who, that's all.

Mr. STAGGS. I called him and gave him that information; he says will you dictate a memo.

Senator BIDEN. So you gave him this information.

Mr. STAGGS. And this is the information that I dictated, because a U.S. Marshal was going to pick this up within an hour.

Senator BIDEN. But did you tell him before you hung up the phone that this is what you were going to dictate?

Mr. STAGGS. I didn't tell him what I was going to dictate; I just told him I was going to make a dictated memo.

Senator BIDEN. About what?

Mr. STAGGS. About the situation that I knew, in reference to the Bethune precinct in the November 6, 1962, election. And from the information that I had in the article, this is what I dictated.

Senator BIDEN. Do you recall whether he told you he was at Bethune or not at that time?

Mr. STAGGS. No, I called him.

Senator BIDEN. No, when you were speaking to him on the phone, did he tell you, do you recall?

Mr. STAGGS. On November the 17?

Senator BIDEN. Yes; back when you dictated this sworn affidavit.

Mr. STAGGS. Based on the article that I had looked at, I told him that it was my knowledge that he was not there; that's why I dictated this.

Senator BIDEN. And what did he say to that?

Mr. STAGGS. He didn't say anything; he said would you please dictate a memo and we'll have the U.S. Marshal come by and pick it up. And this was dictated based on the information I had at the time; 2 or 3 days later, 2 or 3 days later——

Senator BIDEN. I got that part.

Mr. STAGGS [continuing]. I learned, from the information we had in the file; that file then was sent back there, and this was corrected.

Senator BIDEN Let me see if I got this straight now—and I won't take any more time, Mr. Chairman.

You called Mr. Rehnquist apparently before his hearing in 1971 on November 17, and during that conversation with Bill Rehnquist you said: Bill, you weren't anywhere near that precinct in Bethune.

Mr STAGGS. No; I told him that the accusations that he was being accused of——

Senator BIDEN. Which were what?

Mr. STAGGS. Which was that he was down there at Bethune precinct and that he was a member of the John Birch Society.

Senator BIDEN. Yes.

Mr. STAGGS. I said that I do not think that is correct, I have a file on it, I will get the information; and he said will you please dictate a memo.

I originated the call because of the article in the Arizona Republic.

Senator BIDEN. I will come back to Bethune in a second.

The CHAIRMAN. I want to ask two or three questions of all of you real quickly. I've got to catch a plane, and Senator Hatch will carry on this hearing after I've gone.

And this is the question I'd like to ask all of you: Do you know of any act on the part of Justice Rehnquist to harass, threaten or intimidate voters? If you do know of any act, raise your hand.

I see no hands raised.

Do you believe that he is the type of person that would harass, threaten or intimidate voters? If you do, raise your hand.

Mr. STAGGS. No way.

The CHAIRMAN. Do you know of any improper or unethical conduct on his part in connection with elections that have occurred in Arizona? If so, raise your hand.

Mr. STAGGS. No way.

Mr. RANDOLPH. Never.

The CHAIRMAN. Do you feel that he has the character and integrity, the ability, the professional qualifications, the compassion, the judicial temperament, and the keen knowledge of the law to make a good Chief Justice of the United States?

Mr. RANDOLPH. Unquestionably.

The CHAIRMAN. If you do, raise your hand on that. All hands raised?

[Voice]. All but one.

Mr. CASSIDY. I'm sorry, but I don't know the Justice at all.

The CHAIRMAN. You don't know him at all. All the other people have raised their hands, and you don't know him, so therefore you couldn't express yourself.

Now, would you recommend to this Senate committee, knowing him as you have over the years—would you recommend that we confirm him as Chief Justice of the United States?

Mr. STAGGS. Without qualification.

The CHAIRMAN. If you would recommend him as Chief Justice, recommend that this committee approve him—if you would, raise your hand.

That's all eight of you who knew him.

Senator BIDEN. That's seven out of eight, that's pretty good.

Senator METZENBAUM. Six out of seven. Do you want to ask the audience? [Laughter.]

The CHAIRMAN. Let's get quiet. The other six, as I understood, did. Is that correct? Raise your hands again if there is any question.

Senator BIDEN. Is this a true-or-false test?

Senator METZENBAUM. Doesn't the audience vote, too?

The CHAIRMAN. So that's all of you who knew him; in other words, all but one did not know him.

Now, those are the questions that I wanted to ask, and I'm going to turn this hearing over to Senator Mathias, and he or Senator Hatch, one, will conclude the hearing.

Senator METZENBAUM. Not conclude the hearing; we have questions.

Senator BIDEN. I know you have a plane to catch, but is Senator Laxalt certified to work out the agreement on this document?

The CHAIRMAN. Yes, he is; Senator Laxalt is delegated to work to see if we can reach an agreement on the document. If no agreement can be reached, then we will take this matter up just before the Scalia hearing on Tuesday of next week.

Senator LEAHY. Mr. Chairman, I'm sorry to interrupt here, but are we talking about the executive privilege question?

Senator BIDEN. Yes, we are talking about the executive privilege question and the document.

The CHAIRMAN. And negotiations are underway to see if it can be worked out. If not, we will take it up again before the Scalia hearing on Tuesday of next week.

I want to thank all of you gentlemen for your appearance, and you will please stay until questions can be propounded to you about this matter.

Senator HEFLIN Mr. Chairman, we've got a vote on.

Senator **Biden**. I will come back, and, with the chairman's permission, continue my questioning of Mr. Staggs. As a matter of fact, I will miss the boat and continue my questioning right now.

Senator **Mathias** [presiding]. Senator Biden is recognized.

Senator **Biden**. Mr. Staggs, I want to make sure I got this straight——

[**Voice**]. Yes, we can vote?

Senator **Biden**. Well, I'm afraid if I don't do it, I'll lose my train of thought and he'll gain a new train of thought.

All right, I'll come back, then. I will be back in a minute, Mr. Staggs.

Senator **Mathias**. Then, under these circumstances, the committee will take a 5-minute recess.

[Brief recess.]

Senator **Hatch** [presiding]. We might as well get going again. Let's see if we can bring this to close.

Mr. **Randolph**. George F. Randolph. I do not know whether you are through with Mr. Staggs, or not. So it will be examination of Ralph——

Senator **Hatch**. Senator Biden was asking Mr. Staggs a question. As soon as he comes back we will turn the floor back to him.

Mr. **Randolph**. I was not quite through with 1964 at Bethune precinct, when they told us, as we left our challenger in place in the morning, whose name is John Stiteler, that we were lucky to get out of there alive, but our partner might not be so fortunate.

I went back in, and told John, "Don't leave the polling place until the ballots are secured after the polls are closed and we'll come get you."

So we sent the police down, and our escort, and the rescue was carried out, but I was not present.

I want to say, that during the years 1964—my recollection in 1960 is just not very good, but 1962 and 1964, every time that we were called in these telephone cars, or that we called in on the telephone, that I can recall, Justice Rehnquist was there. And he was not appointed as a challenger in either year, so it is highly unlikely that he ever went out of headquarters to do anything but just advise, and he was much more valuable in the office on the telephone, because he could reach so many more of us.

And they had to leave Jim Bush or Bill Rehnquist there in the office, so that we could counsel and advise about the problems.

Senator **Hatch**. I agree with you. Everybody here today has been sincere, but there is a case of mistaken identity.

Mr. **Randolph**. Frankly, it just is a matter of logistics, Senator Hatch. He did not have time to get out there and do any challenging. So all I can say, that he is a meticulously polite and courteous gentleman, and always has been, and for him to ever have harassed anyone is totally out of character.

Senator **Hatch**. Yes. I agree with you.

Mr. **Randolph**. I would like to address the remarks—I have talked enough about Mr. Brosnahan. I think his recollection is just flat incorrect.

That is—we will sum up with that. You were not here, Senator Hatch, but that is—we will just leave it at that.

I think it was a slip of the tongue, but it is in the record. Mr. Pine, said that Mr. Rehnquist challenged voters in 1954. In 1954, we did not challenge voters. We did not have a program.

Senator DECONCINI. Mr. Chairman, I caught that, too, but he corrected that later in the record. He made a mistake. He meant 1964.

Mr. RANDOLPH. I think that is correct.

Senator DECONCINI. And I happened to ask him, after he testified and———

Senator HATCH. I think that is correct.

Senator DECONCINI [continuing]. And he had 1964 on his mind, but it was a slip of the tongue.

Mr. RANDOLPH. I think that is probably right. OK.

Senator HATCH. He did go 1958, 1960, 1962, and 1964 in his statement.

Mr. RANDOLPH. True. He seems to recollect that in 1962, that Mr. Rehnquist went to Bethune--or 1962, I think he was confined to 1962. Isn't that right, Senator DeConcini?

Senator DECONCINI. That is my recollection.

Mr. RANDOLPH. And that was the year that we really got organized on this smooth out program, where we tried to have it organized so that the voting would run smoothly. And I know that Mr. Rehnquist would not have gone to any precinct, and challenged in a manner in which he was instructing us otherwise———

Senator HATCH. Mr. Randolph, let me interrupt you.

Mr. RANDOLPH. Yes, sir.

Senator HATCH. Let me ask a few questions before Senator Biden comes back.

Mr. RANDOLPH. Yes, sir.

Senator HATCH. Let me turn to you, Mr. Maggiore.

Mr. RANDOLPH. As a matter of fact, the Chairman said when you got back, to continue with Mr. Maggiore.

Senator HATCH. Yes. If I could, I would just like to say this to you. We appreciate your being here. As I understand it you were the Democratic Party county chairman in 1962. Is that right? Am I pronouncing your name right, Mr. Maggiore?

Mr. MAGGIORE. Yes. It is Maggiore.

Senator HATCH. Did you receive a call at the Democratic county headquarters from Mr. Charlie Pine in that year about any incident at Bethune School?

Mr. MAGGIORE. No. I did not.

Senator HATCH. Did any of your associates, or lieutenants in the party, or anyone else, from any source, ever mention that Mr. Rehnquist challenged voters, or behaved improperly in any fashion?

Mr. MAGGIORE. No.

Senator HATCH. Not one.

Mr. MAGGIORE. May I say something for Mr. Pine?

Senator HATCH. Yes.

Mr. MAGGIORE. I think that since he was talking about the headquarters in Roosevelt, I think he was in 1964 and not in 1962, and we have got to remember that that was 25 years ago. So I think it was in a different frame than in the sixties———

Senator HATCH. He is a very sincere man, but if anybody tries to remember what happened back in 1964 and 1962—I do not care who you are—you are going to have a rough time.

Senator DECONCINI. Would the Chairman yield? Just for the record, can Mr. Maggiore tell us, where was the Democratic headquarters in 1962?

Mr. MAGGIORE. Dr. Ragsdale, the very prominent black man——

Senator DECONCINI. Lincoln Ragsdale, yes.

Mr. MAGGIORE [continuing]. Had given us headquarters on Washington.

Senator DECONCINI. And then in 1964 it was on Roosevelt?

Mr. MAGGIORE. In 1964 it went to Roosevelt, yes.

Senator DECONCINI. I was just a little Pima County boy, then. I did not understand where those were. So in 1962 it was on Washington and in 1964 it was on Roosevelt.

Mr. MAGGIORE. 1962 was—and what we, we—I think you remember Senator Smith. He was—he had given us some offices during the campaign, and he was side by side with me, as looking to see whether the Republicans were doing the right thing.

Senator DECONCINI. Thank you. Thank you, Mr. Chairman.

Senator HATCH. As a Democratic leader, isn't it fair to say that you probably would have heard, of any person intimidating, or attempting to intimidate minority voters?

Mr. MAGGIORE. I would think so.

Senator HATCH. As a matter of fact, that was something you were watching for very carefully?

Mr. MAGGIORE. Yes. That's—I think, if you look at the paper—I think you have got a record of the paper—I did write a letter to the State chairman, and there was a copy to the Chairman Staggs, telling him about my opinion of what occurred, and that I thought that there should be some accomodation to improve things so that we could challenge—but that we could challenge in a way where nobody would be injured and no rights would be lost.

Senator HATCH. Did you know Mr. Rehnquist at the time? Did you know who he was?

Mr. MAGGIORE. Yes. I am an attorney and I am also a retired U.S. bankruptcy judge. So I did know him, yes.

Senator HATCH. Did you know him personally?

Mr. MAGGIORE. Yes.

Senator HATCH. What did you think of him?

Mr. MAGGIORE. I think he is a very fine man, and I think he is probably as unassuming as any person I have ever seen, and that is why I understand his law clerks love him because of the fact that down deep, he does not take himself too important. He sticks to his opinions, I do not agree with all of his opinions, but I think he loves the law like a lot of us love the law.

Senator HATCH. I agree. If his name had been mentioned in any way would that have triggered something in your mind? Would you have remembered that? Is that correct?

Mr. MAGGIORE. I certainly would.

Senator HATCH. It would not have been something you would have forgotten.

Mr. MAGGIORE. That is correct.

Senator HATCH. He was well known by Democratic Party leaders. If he had done some of the things he has been accused of doing, there is no way that that would not have come to your attention.

Mr. MAGGIORE. That is correct. I think that was shown by Judge Hardy's statement and Judge Mickey's statement.

Senator HATCH. Judge Hardy is a Democrat. Is that correct?

Mr. MAGGIORE. Yes; he is a very good Democrat.

Senator HATCH. Very fine Democrat. Do you know Mr. Pine or Mr. Pena?

Mr. MAGGIORE. I know both of them, yes.

Senator HATCH. Did you know them in 1962 or 1964?

Mr. MAGGIORE. I knew Senator Pena in 1962. I cannot recollect when I first met Mr. Pine. It may have been after——

Senator HATCH. You could have known him then?

Mr. MAGGIORE. It could have been. Yes.

Senator HATCH. Do you recall hearing any complaints from them, at that time, that might bear on this matter?

Mr. MAGGIORE. No.

Senator HATCH. Would it not have been likely, had they complained, that you would have heard about it?

Mr. MAGGIORE. I would assume that somebody would tell the leader what is happening since we were interested at that time.

Senator HATCH. Especially on challenges like this?

Mr. MAGGIORE. Challenges. Certainly.

Senator HATCH. You knew that Mr. Benson had been removed from that polling place. Is that right?

Mr. MAGGIORE. Yes. Mr. Benson was removed.

Senator HATCH. That came to your attention, did it not?

Mr. MAGGIORE. Very effectively, yes. You had mentioned two of the people that were my assistants at that time, and I think that that was taken care of.

Senator DECONCINI. Will the Senator yield on Mr. Benson?

Senator HATCH. I will be happy to.

Senator DECONCINI. I got the feeling that when Officer Cassidy testified, that Benson was a real problem in the Bethune precinct at that time. Do you concur with that observation?

Mr. MAGGIORE. I concur, yes.

Senator DECONCINI. Do you think he broke the law?

Mr. MAGGIORE. I think he may have. I think he went a little too far. Again, it is such an archaic law, that one of these days we are going to have to approach it, because it is a question of fact——

Senator DECONCINI. Yes. Did you send anybody down there, Judge?

Mr. MAGGIORE. Yes. I did. I sent——

Senator DECONCINI. You sent those two?

Mr. MAGGIORE. Two.

Senator DECONCINI. Two men reported there?

Mr. MAGGIORE. Yes.

Senator DECONCINI. I have some other questions for the witness.

Senator HATCH. Mr. Maggiore, I will come back to you later. I want to allow some time for my colleagues and I just want to chat with Mr. Cassidy for a minute. I want to tell you how much I respect you, as a Democratic Party leader, for being here and speaking up for Mr. Justice Rehnquist as you have, even though you disagree with him philosophically.

That is not untypical of a number of people who may disagree with him philosophically, but realize the quality of the individual, and have spoken up for him all over the country.

Mr. Cassidy, we appreciate having you here as well. Is it correct, that you spent the whole day in the Bethune precinct in the 1962 election?

Mr. CASSIDY. Yes, sir. From about 6 o'clock in the morning until 3 or 4 in the afternoon.

Senator HATCH. You were there that whole day?

Mr. CASSIDY. Yes.

Senator HATCH. In what capacity?

Mr. CASSIDY. I was the sergeant in that particular squad area.

Senator HATCH. You were a policeman there?

Mr. CESSIDY. Yes.

Senator HATCH. You were assigned to make sure that the laws were upheld?

Mr. CASSIDY. Yeah. There had been rumors the day before, Senator, that there was possibly going to be trouble over the challenges, and so on going on shift in the morning I went directly to the school.

Senator HATCH. Can you give me a physical description of Mr. Benson who was the Republican challenger in 1962?

Mr. CASSIDY. Probably 6 foot, 6 foot, 1, 200 pounds, roughly.

Senator HATCH. Some say he is about 6 foot, 3. Pretty much the same size as Mr. Justice Rehnquist then?

Mr. CASSIDY. Fairly close I would guess, yes.

Senator HATCH. Did you hear a single complaint about Mr. Rehnquist that whole day that you were there?

Mr. CASSIDY. No, sir. I never heard his name.

Senator HATCH. Never heard his name mentioned?

Mr. CASSIDY. No, sir.

Senator HATCH. And had he been challenging people in a vociferous way, you would have known that, wouldn't you?

Mr. CASSIDY. I am certain that I would have. When I got there in the morning, which was about 6:30, 6:30 or 7 o'clock, when we had the first disturbance, I advised the marshal, and both sides, Republican and Democrat, if they had any problems I was going to be in the immediate area and to call. And I do not think we had any more serious problems after that for 4 or 5 hours. So I do not think anything could have happened in there at all.

Senator HATCH. So basically there were no complaints about Mr. Rehnquist personally?

Mr. CASSIDY. None.

Senator HATCH. If there were complaints, they would have certainly been brought to your attention because you were there?

Mr. CASSIDY. I would think so. Yes, sir.

Senator HATCH. Were there complaints throughout the day about anyone other than Mr. Benson?

Mr. CASSIDY. Only Mr. Benson's complaints about, the Democratic Party members.

Senator **Hatch**. Mr. Pine and Mr. Smith said they saw Mr. Rehnquist challenging voters at the Bethune precinct in 1962. Mr. Pine has said that he was there earlier in the day.

You have indicated you were at the Bethune precinct from the beginning.

Mr. **Cassidy**. Yes, sir.

Senator **Hatch**. You were there at that time?

Mr. **Cassidy**. Yes.

Senator **Hatch**. Did you see anyone other than Mr. Benson challenging voters at that precinct?

Mr. **Cassidy**. I am positive in my own mind, that no one else could have challenged any other voters there. I made it very clear when I first got there, that I was going to be immediately available; if there were any violations to the law, that I was going to solve that problem by putting somebody in jail; and advised each side to be sure and notify me immediately if there was any more problems.

They settled at that time among themselves, that they would continue with the challenges, and the problems ended. No one else came to challenge. The only individual that I know of there, as a challenger, was Bentson all day long.

Senator **Hatch**. Did you make any record about the Bethune incidents?

Mr. **Cassidy**. A police report was made on the alleged assault in the afternoon. Yes, sir.

Senator **Hatch**. That is the police report that I placed into the record earlier this day?

Mr. **Cassidy**. Yes. It is.

Senator **Hatch**. The only one. Are you active in either political party?

Mr. **Cassidy**. No, sir; not at all.

Senator **Hatch**. Do you participate in politics at all?

Mr. **Cassidy**. Not whatever.

Senator **Hatch**. Are you a Republican or a Democrat? I hate to ask you these questions, but I think they are relevant.

Mr. **Cassidy**. I wish you had not. My Dad, if he sees me sitting with all of these Republicans, I am in trouble. But I did register as——

Senator **DeConcini**. That is quite all right, Mr. Cassidy. You just stand up for your convictions.

Senator **Hatch**. He is sitting with us Republicans and we appreciate him. [Laughter.]

Mr. **Cassidy**. I did register Republican back about 3 or 4 years ago, though.

Senator **Hatch**. Did you? That is good.

Senator **Heflin**. A wayward son.

Senator **Hatch**. A real live Senator. We do appreciate your being here. You do not have any axes to grind, do you? Or do you?

Mr. **Cassidy**. No, sir; none whatever.

Senator **Hatch**. Everything you have told us here is true. I can see why some people could be mixed on what happened there. Mr. Rehnquist and Mr. Benson were about the same size. Both had brown hair.

There could have been a real mix-up here. I do not want to find fault with anybody. But we are talking about a man who was a respected Assistant Attorney General of the United States for a number of years, and has been on the Supreme Court for 15 years.

It makes you wonder, even if what some of the prior five panelists said was true, and there is plenty of reason to doubt that it was, or at least question it.

But even if it was, it seems to me that Mr. Justice Rehnquist deserves the benefit of the doubt on all of these issues. Mr. Justice Rehnquist certainly has better than 15 solid years of public service. That speaks for itself.

It speaks more loudly than what may or may not have happened 24 years ago. But you speak very loudly since you were there. You have no axes to grind. Mr. Maggiore speaks loudly. All of your testimony is important, but in particular, I found both of your rewards to be extremely important. And that is not finding fault with any of the Democratic witnesses.

There is lots of room for mistaken identity; lots of room for failure to recollect; lots of room for compounding things in your mind over a 24-year period, and not remembering everything that happened back in 1962.

Who is next on this side? Senator DeConcini, let me turn to you.

Senator DECONCINI. Thank you, Mr. Chairman. Mr. Cassidy, while we have you here, you said you were there from 6 in the morning at the Bethune precinct, in 1962, until about 4 o'clock?

Mr. CASSIDY. Roughly, yes.

Senator DECONCINI. And when did you escort Mr. Bentson away?

Mr. CASSIDY. I wish it would have been earlier, but I think it was probably somewhere around 2:30, and it was not my idea to escort him away. He asked for protection. He felt—he said he felt that he was in danger, and said he wanted to go home, and asked would I walk him to the car and get him out of the area.

Senator DECONCINI. Did you have to advise him that he might be arrested during that day?

Mr. CASSIDY. No. When he claimed the assault, which had happened probably about an hour before he left, we had mixed stories as to exactly what happened; whether he threw the first punch, whether they threw the first punch. So a report was made to be submitted to the county attorney. So no one was going to jail at that time.

Senator DECONCINI. And what about before the so-called assault? Was Mr. Bentson a problem?

Mr. CASSIDY. He—like I said earlier, he was less than tactful. He did not handle the challenges as well as he might have.

Senator DECONCINI. Did you have to say something to him?

Mr. CASSIDY. Yeah, but I am not sure it improved him, Senator.

Senator DECONCINI. Pardon?

Mr. CASSIDY. I am not sure it improved him.

Senator DECONCINI. Do you remember what you said to him, or——

Mr. CASSIDY. Well, when I originally got there, it was very loud and very noisy in there, a lot of shouting going on, and that is when I told them that on the election laws or on the violations, that would be up to the marshal, but any violations of the city code, or State code, I was going to make an immediate arrest and see if we could not make the problem go away that way.

Senator DECONCINI. And you told him that?

Mr. CASSIDY. Yes. He was——

Senator DECONCINI. Were there any other troublemakers there?

Mr. CASSIDY. Not at that time, no. No, sir.

Senator DECONCINI. Now did you get a chance to see Mr. Brosnahan?

Mr. CASSIDY. Yes; I saw part of his testimony. Yes, sir.

Senator DECONCINI. Did you ever see him at Bethune precinct on that day?

Mr. CASSIDY. I do not recall him, but everybody and their brother came. We had everybody at one time or another during the day.

Senator DECONCINI. Do you think you would have remembered a U.S. attorney and an FBI agent, had they come?

Mr. CASSIDY. I knew they were on the way, but they were involved with the voting violation type thing, and I with the crowd, or the people.

Senator DECONCINI. A Mr. Mickey was the U.S. District Attorney there, and his statement says that, in 1962, that he went to Bethune precinct. Do you know Judge——

Mr. CASSIDY. No, sir. I have heard the name of course, but I do not know him personally.

Senator DECONCINI. Judge Mickey. You do not remember him coming to that Bethune precinct that day?

Mr. CASSIDY. No, sir, but he well could have.

Senator DECONCINI. When you left around 4 o'clock, did you hear of any other problems at Bethune precinct, when voting closed?

Mr. CASSIDY. No; as I understand it, from the sergeant, when we talked the next day, the sergeant that relieved me, there were not any further problems after Bentson left.

Senator DECONCINI. I think you answered this question. Did you see Mr. Rehnquist at the polling place while you were there?

Mr. CASSIDY. No, sir. I do not know him at all.

Senator DECONCINI. You do not know him?

Mr. CASSIDY. No.

Senator DECONCINI. Would you know him, had you saw him or would you be able to identify him?

Mr. CASSIDY. No, sir. I would not have.

Senator DECONCINI. You do not know what he looks like now?

Mr. CASSIDY. I do, yes.

Senator DECONCINI. Can you recall if he was there?

Mr. CASSIDY. No, sir. Not at all.

Senator DECONCINI. What?

Mr. CASSIDY. No. I cannot.

Senator DECONCINI. You cannot recall whether or not he was there, is that right?

Mr. CASSIDY. No.

Senator DECONCINI. I mean, you do not know whether he was there or was not, is that correct?

Mr. CASSIDY. Correct.

Senator DECONCINI. He could have been there?

Mr. CASSIDY. Yes. He could have.

Senator DECONCINI. Yes. And you would not have known that?

Mr. Cassidy. Yes, sir.

Senator DeConcini. And there were a lot of people there during the day?

Mr. Cassidy. Yes.

Senator DeConcini. OK. If your testimony is that only Bentson was doing the so-called challenging, then it is safe to say that if Mr. Rehnquist was there, he did not do any challenging during the hours that you were there?

Mr. Cassidy. Yes; I would be certain that he did not do any challenging.

Senator DeConcini. Thank you. Judge Maggiore, Judge Charlie Hardy, what position did he hold, or play, during 1962 or 1964?

Mr. Maggiore. I assume he was in the same position as Justice Rehnquist was.

Senator DeConcini. Well, in 1962, was he——

Mr. Maggiore. Sixty-two is——

Senator DeConcini. Was he appointed by you or asked by you?

Mr. Maggiore. I may have. I do not recollect it from my own recollection, but I—he was a big help all the time, and I remember that he was around for, doing—because of his—a very bright man.

Senator DeConcini. I mean, did you ask him to serve in any legal capacity?

Mr. Maggiore. I probably did.

Senator DeConcini. You do not remember?

Mr. Maggiore. I cannot recollect.

Senator DeConcini. Was there a group of lawyers, do you know?

Mr. Maggiore. Yes; we had some lawyers. I remember Art Ross and I remember Jane—Jane Greer, and we had—I would assume that we had about 10 or 12 lawyers working there. But I do not remember anything that Mister—Mister——

Senator DeConcini. Brosnahan.

Mr. Maggiore. What is the present pronunciation? I——

Senator DeConcini. Brosnahan.

Mr. Maggiore. Brosnahan. I do not remember Mr. Brosnahan in 1962, but that may be my lack of recollection, Senator.

Senator DeConcini. At that time, do you remember who was U.S. district attorney?

Mr. Maggiore. Yes; Judge Mickey was the U.S. district attorney. He was the one that told us that there was not any action he could take.

Senator DeConcini. He says in his statement that he visited Bethune precinct.

Mr. Maggiore. He may have because I was not there at the time. I did, I did visit Bethune, I think two or three times, and I was there——

Senator DeConcini. That day?

Mr. Maggiore. That day.

Senator DeConcini. That voting day. Did you ever see Mr. Rehnquist there?

Mr. Maggiore. No.

Senator DeConcini. When you were there, did anyone ever tell you he dropped in or dropped by?

Mr. Maggiore. No. This is the first time I have ever heard that Justice Rehnquist was mixed up in the way that everybody said that he was. I thought—I remember some of the organization of the Republican Party. I used to, used to compete with Chairman Staggs. We used to have some good times arguing about things. And I knew some of the attorneys who had worked, and in my thought, Justice Rehnquist was the attorney for the party. That is why I went to him that day, because I did not get much accomplished with the then State chairman.

Senator DeConcini. Were you working for the county attorney in 1962 or were you a judge then?

Mr. Maggiore. No, I was—in 1962 I was just—I was in practice of law.

Senator DeConcini. You were in private practice of law?

Mr. Maggiore. I was in private practice of law, as much time as I had for that job.

Senator DeConcini. Mr. Staggs, if I could just ask you a question or two. Mr. Bentson—was he assigned there by you to that precinct?

Mr. Staggs. Well, in my November 17, 1971, letter, I stated in there that I had assigned him to that, but that again is——

Senator DeConcini. OK. I am sorry. I just had forgotten.

Mr. Staggs. Well, when I said I assigned him, I signed the affidavit authorizing him to be a challenger.

Senator DeConcini. Right.

Mr. Staggs. But he was actually assigned to that precinct by Bill Turner and/or Gordon Marshall. They were the ones that did the assigning. But I, when I said here that I assigned him, I signed the affidavit.

Senator DeConcini. You signed, authorizing him to represent the party?

Mr. Staggs. Yes, as county chairman.

Senator DeConcini. Did you know him?

Mr. Staggs. I knew him remotely. I mean, he was a precinct committeeman in Maricopa County.

Senator DeConcini. Now when he was escorted out, at his request, were you advised of that?

Mr. Staggs. I said in here also that I, in my FBI report, that when Bill Rehnquist came back, I do not know whether I was advised of anything, activity that took down—that took place down at the Bethune precinct or not, and I still do not recall whether——

Senator DeConcini. Well, yes, your FBI report says that you do not remember Mr. Rehnquist telling you anything about what happened.

Mr. Staggs. Right.

Senator DeConcini. But did you know that Mr. Bentson had left?

Mr. Staggs. I do not recall meeting with Bill Rehnquist after he came back, so I do not recall if I had any report that afternoon.

Senator DeConcini. Did you send someone else down there to take——

Mr. Staggs. Yeah. We had instructed a Harold Musgrave to go down there. Someone in the committee——

Senator DeConcini. So you must have known that Mr. Bentson had left?

Mr. Staggs. Well, we figured that he would probably get replaced, get kicked out, or something.

Senator DeConcini. You just do not remember the sequence of how that happened?

Mr. Staggs. No.

Senator DeConcini. Mr. Marshall, Mr. Turner, can you help me? How did Mr. Bentson get there in the first place and what happened when he got booted out, or left? Did you choose him, and did you choose Musgrove, or did Mr. Staggs?

Mr. Turner. Senator, I do not recall Mr. Bentson at all, and I cannot recall, really, how the assignment process was made. We had a number of volunteers. Many of them were precinct committeemen, and there was some process by which they were assigned to various precincts.

So I would not know Mr. Bentson——

Senator DeConcini. Mr. Marshall, how about you?

Mr. Marshall. No, Senator. As Mr. Turner said, we received volunteers; many of them we did not know by sight. They appeared at the instructional meeting and got their instructions, and we assigned them to the precincts as they signed, or volunteered to serve.

Senator DeConcini. So you do not remember sending Mr. Musgrove there?

Mr. Marshall. No, sir.

Senator DeConcini. Mr. Staggs, you stated in your opening statement, that there was a lot of voter fraud, and "tombstone" voting. What proof do you have to offer the committee, that that was happening in Arizona?

Mr. Staggs. Well, I do not have any proof with me. There was historically rumors and comments that more votes were being cast down in there, and the basis of setting up the challenger committee, as I stated, was that basically, the voter registration list contained names that did not exist. I call that fraud.

Senator Heflin. I wonder if the Senator would yield to me while you are on this subject.

Senator DeConcini. I will be glad to yield.

Senator Heflin. I just wonder, Mr. Staggs, if you are familiar with the old Western Republican prayer, that goes like this: That when I die, if I die, I want to be buried in Phoenix, AZ, in order that I may remain active politically?

Mr. Staggs. I thought that was the Democrat. I think they got that from Cook County.

Senator DeConcini. Mr. Staggs, the reason I raise it is serious, because I think that——

Senator Hatch. You are a very disruptive Senator, Senator Heflin.

Senator DeConcini [continuing]. Perhaps poor Cook County and the people of Chicago have to live with that history, and I hate to see whoever might be viewing this, a charge laying on the table here that there was massive voter fraud, "tombstone" voting going on in Maricopa County during that time, without some allegations that can be brought forward to justify it, because I think it is an embarrassment to our State and our history. Maybe you have some proof.

Mr. Staggs. Well, I do not think we——

Senator DeConcini. If you do, I would be glad to have it.

Mr. STAGGS. I do not think we could go back now and get the voter registration lists back in those early years, Senator.

Senator DECONCINI. You do not have anything tc offer us, that there was tombstone voting?

Mr. STAGGS. Not at this late date.

Senator DECONCINI. OK. Mr. Staggs, were you——

Mr. STAGGS. I would say this, though: that we had proof that there was illegal names on the voter registration lists, Senator——

Senator DECONCINI. What proof did you have?

Mr. STAGGS [continuing]. That was proved by the returned first class mailings that we sent out to all the registered Democrats on that list, that came back, and when——

Senator DECONCINI. How many did you have?

Mr. STAGGS [continuing]. They were checked out, there was names at vacant lots, and there was people that had died. There were people that, the names registered to vacant houses, and that type of thing. I refer to that as, if they would try to vote those names, as being fraudulent.

Senator DECONCINI. But you do not have any proof that they tried to vote those names. All you have proof is it came back that nobody lived there, or there was nobody there, right?

Mr. STAGGS Yes, we had, we had proof, because——

Senator DECONCINI. You did?

Mr. STAGGS [continuing]. Some of those—that is why those envelopes were there at the precinct. Some people tried to vote those names, and that is when they were challenged.

Senator DECONCINI. And do you have proof that some people tried to vote those——

Mr. STAGGS. We had that, back then. We do not have it now.

Senator DECONCINI. Does the party have any of that now?

Mr. STAGGS. No; this was 24 years ago.

Senator DECONCINI. I understand. Do you remember how many numbers you might have had?

Mr. STAGGS. I do not recall. I mean——

Senator DECONCINI. Was it dozens, or——

Mr. STAGGS. The letters that came back, I would say probably in all of Maricopa County, may have totaled 300 or 400.

Senator DECONCINI. Did you mail all of Maricopa County? All Democrats?

Mr. STAGGS. No; we mailed basically everything I think south of McDowell Road.

Senator DECONCINI. Why was that?

Mr. STAGGS. Well, that seemed to be where the problems were.

Senator DECONCINI. You did not have any evidence of problems up North Central Avenue, or in Sunny Slope or——

Mr. STAGGS. Well, not at that time.

Senator DECONCINI. OK. Mr. Staggs, were you aware of what the instructions were by the lawyers' committee that Mr. Rehnquist headed up——

Mr. STAGGS. No, sir.

Senator DECONCINI. On what the challenging criteria were?

Mr. STAGGS. No; they were in charge of the legal committee and the others were in charge of the challenging committee. That responsibility was delegated to them.

Senator DECONCINI. Mr. Randolph, maybe you can help me, then. Thank you, Mr. Staggs. The instructions that you gave to the challenging committee. Mr. Bush, if I recall his testimony here, said that you never talked about the potential challenge of whether or not a voter could speak English. Is that your recollection?

Mr. RANDOLPH. We did address that problem, Senator, and that is the reason we gave a copy of the statute to each of the challengers.

Senator DECONCINI. Mr. Bush must have forgotten about that or was not there maybe?

Mr. RANDOLPH. No; Mr. Bush did not forget about it, Senator, I do not believe. We were told in the school—Bill Rehnquist and Jim Bush said: "If you have somebody that comes forth and it is just painfully obvious"—this is in 1960, mind you; we did not do this after 1960—"that you are to address a challenge to the board; you are not to address the voter in any way. We do not want to be accused of harassing voters." That was the instruction that was given in school.

Senator DECONCINI. In school. Did you give them any cards or any information as to how to question someone, whether or not they could read in the English language?

Mr. RANDOLPH. I just told you. We told them not to question anyone.

Senator DECONCINI. Told them not to.

Mr. RANDOLPH. We told the challengers—in 1960 and before—we told them to make a challenge to the board saying we think that this person does not qualify to vote because of ARS 16-921, paragraph 7. Would you please give them a test.

Senator DECONCINI. Let me quote to you from Mr. Bentson's statement. He—this being Mr. Bentson—pointed out that he, himself, did not turn anybody away, this being the duty of the inspector and the two judges. He, Bentson, did ask perhaps 1 out of every 10 persons in the voting line to read from the card, and if they seemed unable to do so, he would then, working through the inspector, formally challenge them.

Was that contrary to the instructions given by your committee?

Mr. RANDOLPH. That is to the best of my recollection.

Senator DECONCINI. So there was no card, or anything given out in this kit, that was so-called, given to the——

Mr. RANDOLPH. No, sir. I do not think so. I am quite sure not.

Senator DECONCINI. How many lawyers were on the committee?

Mr. RANDOLPH. Oh, there were at least a dozen.

Senator DECONCINI. A dozen?

Mr. Chairman, I have no further questions.

Senator HATCH. Thank you so much, Senator.

Senator Heflin, do you have any further questions?

Senator HEFLIN. Yes, I would like to—Mr Cassidy, there have been some questions here about Mr. Wayne Bentson's size. You identified him being about 6 feet 1. And there is some inference that he could have been—someone could have mistaken him for Bill Rehnquist.

And I believe later on you said that you did not know Bill Rehnquist at that time when you were there at that precinct.

Now, have you seen this Wayne Bentson since that time, on occasion?

Mr. CASSIDY. No, sir, I have not.

Senator HEFLIN. Do you know whether there is any similarity of appearance between Justice Rehnquist and Mr. Wayne Bentson?

Mr. CASSIDY. No, sir, I would not be able to guess.

Senator HEFLIN. You will not be able to guess one way or the other.

Do you remember whether one of them was brown haired, or blond haired, or red haired.

Mr. CASSIDY. Well, I have only seen pictures of the Justice. And I only saw Bentson 1 day for 7 hours And there is no way to compare them.

Senator HEFLIN. All right. So now——

Senator MATHIAS. Senator Heflin, would you yield to me just briefly? Not to be taken out of any time of yours.

Senator HEFLIN. Be delighted to.

Senator MATHIAS. As you know, there has been some question with respect to the committee's obtaining documents prepared while Justice Rehnquist was Assistant Attorney General. Some members of the committee have been meeting to try to resolve this in the last hour. I just wanted the rest of the committee to know that there is an agreement with the administration to try to work out this documents problem over the weekend, in an attempt to resolve the difficulty. We will meet on that subject on Tuesday.

Senator HATCH. Is that agreed to?

Senator BIDEN. That is correct.

Senator KENNEDY. I want to say, Mr. Chairman, this is an issue as I know that the Senator from Maryland understands that is very intensely felt. We know both those within the administration, in terms of the application of executive privilege, and those of us on the committee who were desirous to obtain documents, in some very specific areas.

And we do feel that in terms of our requirements, our assignment, our responsibility to the Senate and to the American people, that to fulfill our responsibility in the area of advise and consent, that that material is essential.

But we are aware that these efforts are going to take place over the course of the weekend, and that seems to me to be a reasonable request, and hopefully they will be able to respond in a satisfactory way to these requests. And I think that that is a process which at this time we would support and look forward to a positive result.

I want to thank the Senator from Maryland and the other members of the committee for working on this area. And I wish that we will be successful. I do not want to characterize whether I am hopeful or not hopeful on it. Because it is complicated; it is difficult. And the positions are strongly held by those who want the documents and evidently by the administration who has been reluctant making them available.

But it does seem to me a procedure which is worthy of the best efforts of those who are seriously committed in trying to deal with these two viewpoints.

And I, for one, would be glad to see that effort take place. And hopefully, we may get positive results.

Senator HATCH. Thank you.

With that, then, Senator Mathias, anything further?

Senator MATHIAS. Nothing further. I think a good faith effort is underway, and we will see how it works out on Tuesday.

Senator HATCH. Let us hope that it does.

Senator Heflin, we will get back to you.

Senator HEFLIN. Well, let me say that I am personally delighted to know that there is progress being made in this regard. I was seriously concerned about the invoking of the right of executive privilege here over these documents.

I think there is a serious danger that the future of the Supreme Court could be affected. Claiming executive privilege could leave a lot of dark clouds of mystery and uncertainty pertaining to the Supreme Court.

The mind of man really has no bounds in regards to suspicion when there is uncertainty and mystery. And I think that since Justice Rehnquist has himself said he had no objection, he waived it, the documents ought to be cleared. Everybody knows, if a state of doubt is left that the dark cloud of suspicion hangs not only over his head, but may hang over the Supreme Court of the United States.

And I think that we certainly do need to clear it up.

Senator MATHIAS. I thank the Senator from Alabama for yielding

Senator HATCH. Have you finished, Senator Heflin?

Senator HEFLIN. No; I want some questions. I was just making a statement.

All right, so now, Mr. Cassidy, did you know Senator Pena at that time?

Mr. CASSIDY. I am sorry, I missed the name.

Senator HEFLIN. Did you know Senator Pena at that particular time?

Mr. CASSIDY. No, I did not.

Senator HEFLIN. Well, at this particular place that you were, was it a school?

Mr. CASSIDY. Yes, it is.

Senator HEFLIN. Was there a principal's office that was located somewhere away from the activity where people went to use a telephone?

Mr. CASSIDY. As you approach the front of the school and took a few steps into the entrance of the school, the hall, and I think there was a nurse's office that everybody was using for the telephone.

All right, sir. Now—gentleman here on the end?

Mr. RANDOLPH. Senator Pena testified about a challenge in Butler precinct. Officer Cassidy was at Bethune.

Senator HEFLIN. All right. Thank you for clearing it up.

All right, now let me ask you this: Did you have kits that you prepared for challengers?

Mr. RANDOLPH. Are you asking that question of me, your honor? Yes, we did have kits that were simple things. We provided the statutes. We provided some instructions on what to do if various things happened, phone numbers to call; if they needed to call the county attorney directly, they had that number. Simple things that helped them in the process of processing the election in an orderly fashion.

The kit also had the attorney general's opinion in 1962 that related to the credentials of, a, the pollwatchers. Pollwatchers were to help count the votes; they were not challengers. The second one is the challenger, who was the person from the party on duty who had a credential and was either certified in 1962 by Mr. Staggs or the precinct committeeman, or a party representative. There must be a distinction between those three people. We were entitled, we felt, to have both a challenger and a party representative on the premises. We did not want to push our luck, so we settled for the challenger

In those kits, we set forth the duties of each, and generally were trying to help them in the conduct of the election.

Senator HEFLIN. Were there any instructions in the kit as to how to determine whether they could speak the English language?

Mr. RANDOLPH. Not to my recollection.

Senator HEFLIN. Any printed cards or anything in the kit?

Mr. RANDOLPH. Not to my recollection.

Senator HEFLIN. At this time—and this sort of surprised me, this far back in the sixties—you had, in order to work through a very systematic program of challenges, taken the voters list in certain areas and had, from that, sent registered letters, or letters where you could at least know that they would be returned to you, if addresses were not accurate; is that correct?

Mr. RANDOLPH. Not quite, Senator. We took the addresses off the voter list of all the registered Democrats, as of the date after the time for the registration for voting had occurred. Any of those—and those envelopes, as I testified, were marked: Do not forward; return to sender if it is not deliverable to addressee.

And on the night that we had the class for the challengers, we had all those sorted in boxes, even alphabetized. If they were not alphabetized by us, it was the challengers' responsibility to get them alphabetized in the boxes; they were shoeboxes.

Those were carried, and sealed, into the premises were the voting was taking place. And the voter came in whose name was on an envelope, the challenger was instructed to ask the board to challenge this man. I challenge this man, Mr. Board Member. And then the board was obligated to ask questions and decide whether he was a qualified voter or not.

If they decided—I had it happen, it was reported to me that there were several instances in which the voter was able to explain away to the board's satisfaction the reason for the returned envelope, and they let them vote.

Senator HEFLIN. Well, this was before the days of computers, was it not?

Mr. RANDOLPH. Yes, sir.

Senator HEFLIN. Pretty expensive back in those days, was it not?

Mr. RANDOLPH. Yes, sir.

Senator HEFLIN. I imagine it is much more expensive today, is it not?

Mr. RANDOLPH. Yes, sir.

Senator HEFLIN. Now, in addition to that, you had the kits, and—how many challengers would you have had in the city of Phoenix during those elections in the sixties?

Mr. RANDOLPH. Well, sir, I would say there were about 30 or 40 precincts, at the very outside.

Senator HEFLIN. Thirty or 40 precincts that you targeted for challenges. And you would have sent how many challengers to each precinct?

Mr. RANDOLPH. Just one.

Senator HEFLIN. Would you have had a second shift during the day, or would the same challengers have stayed there during the whole day?

Mr. RANDOLPH. That is right, sir, we did in many of those—some of them they had to work very hard, like Bethune. And so we often had either a very durable challenger such as John Stidler and Mr. Bentson, or we had to have them—well, they often worked, you know, and they had quit at noon and be replaced. But we tried to have someone there all the time.

Senator HEFLIN. So you might have had, what, two or three shifts during the day?

Mr. RANDOLPH. Most of them were just two.

Senator HEFLIN. All right.

Now, Mr. STAGGS. let me ask you this: You had this conversation with Mr. Rehnquist, and you told him that you knew that he had not been—now what did you tell us in this conversation? I believe you said it was November of—what was the date of that? You phoned him, and you had this conversation with him, and he asked you to make this memorandum. Now when was that?

Mr. STAGGS. It was November 17, 1971.

Senator HEFLIN. All right.

At that time, you said you told him two things. What were the two things that you told him that you knew positively?

Mr. STAGGS. Well, the two things that I discussed with him on that phone call that I originated was in response to the article in the Arizona Republic that day that was accusing him of being in that precinct, and it even said in 1964. And also, as I stated awhile ago, of being a member of the John Birch Society. Which neither one was accurate.

Senator HEFLIN. Well, how would you know whether he was or was not a member of the John Birch——

Mr. STAGGS. Well, I happened to know that he was not. And I happened to know that Wayne Bentson was.

Senator BIDEN. Were you, sir?

Mr. STAGGS. No, sir.

Senator HEFLIN. I believe that is all.

Senator BIDEN. Mr. Chairman—he is not here.

Let me follow up on that. So the two things that you told Justice Rehnquist, then Bill Rehnquist, were, that you knew he was not at Bethune School, or Bethune precinct, and secondly, that you knew he was not a John Bircher. And that you were told then that you had an hour within which to work up an affidavit to that effect, because someone was going to come by and pick it up; it was obvious it was needed quickly.

Now, when you said to Bill Rehnquist, I know you were not at Bethune precinct, did he say to you, oh, no, I was?

Mr. STAGGS. No. In 1964, the article said.

Senator BIDEN. 1964; I see.

Mr. STAGGS. But I also did not feel that he was there on November the 6, 1962, which I stated to him.

However, as I said, Senator, 2 or 3 days later—and I prepared this memo from the knowledge that I had that day because of the newspaper article of November 7, which did not refer to him being there at all. And that was what this memo was drafted from.

Senator BIDEN. The only point I am trying to make is, did you tell Bill Rehnquist that you did not believe he was at the Bethune precinct on election day, 1962? That is what you swore in your affidavit, mistakenly you now say?

Mr. STAGGS. Right.

Senator BIDEN. But that is what you swore in your affidavit at the moment, at the time. You had gotten off the phone with Bill Rehnquist only 1 hour earlier, by your own testimony

Now, did you tell him on the telephone that you did not believe he was at the Bethune precinct in 1962?

Mr. STAGGS. Yes.

Senator BIDEN. All right. Now, did he say to you at that moment, you are mistaken, Mr. Chairman?

Mr. STAGGS. No, he did not say anything further. He asked me please, to just dictate a statement and send it. Which I did.

Senator BIDEN. I see. Now, and the statement dictated was: I further hereby certify to the best of my knowledge that Mr. Bill Rehnquist, on general election day, 1962, was nowhere in the vicinity of the Bethune precinct where this activity occurred, nor any time during the general election day?

Mr. STAGGS. Yes.

Senator BIDEN. And then you later——

Mr. STAGGS. Which, that day and that hour turned out to be incorrect, which I corrected 2 or 3 days later.

Senator BIDEN. Obviously, both of you thought it was correct, because he did not object to it.

Mr. STAGGS. Right.

Senator BIDEN. So he thought it was correct at the time, you thought it was correct at the time. Later, upon getting other information, you said, I made a mistake. You then swore out a second affidavit——

Mr. STAGGS. I sent a corrected letter along with the total file.

Senator BIDEN. To whom?

Mr. STAGGS. Which went to the same—to Senator Eastland.

Senator BIDEN. Senator Eastland.

Mr. STAGGS. The same as this letter here.

Senator BIDEN. Now, this was after the hearing was over?

Mr. STAGGS. Apparently the hearing was over after that.

Senator BIDEN. Right. And OK, now——

Mr. STAGGS. Now if you refer to my FBI statement on July 28, 1986, you will note that that is stated that way.

Senator BIDEN. Correct.

Mr. STAGGS. That I stated that he was—that I did send him down there.

Senator **Biden**. Now, the Democratic Chair at the time said, has allegedly said, in the Arizona Republic, dated Wednesday, November 7, 1962, on page—I cannot read it—I assume it is—I do not know what page it is on, it is on an interior page—it does not say—page 11, column 1, thank you.

> But Vince Maggiore, County Democratic Chairman, asserted that some Republican challengers were assuming authority reserved to election board officials.
>
> The tactics being used by Republican challengers in minority areas reflects discredit on a great national party.
>
> There should be no place in America for deliberate attempts to impede the voting of groups that have fought so hard for their rights.

Now, does that—was that statement true then?

Mr. **Staggs**. That is correct.

Senator **Biden**. That is correct. So you think in fact, on the election in question, there were attempts to impede the rights of minorities to vote in your county, by the Republican party?

Mr. **Staggs**. Yes; if they were illegal votes.

Senator **Biden**. Now, sir—and I have been at this so long, I better get your names right here. Mr. Robert Shaw. Is it Robertshaw?

Mr. **Robertshaw**. It is all one word.

Senator **Biden**. Oh, I beg your pardon; I am sorry.

Frederick O. Robertshaw, thank you.

Mr. **Robertshaw**. Right.

Senator **Biden**. I hope I have not referred to you as Mr. Shaw before; if I did, I apologize.

Mr. **Robertshaw**. That is all right.

Senator **Biden**. Mr. Robertshaw, you apparently have stated—let me ask you to restate for me whether or not in your recollection it was likely that Mr. Rehnquist at the time would have been a challenger at any polling place in 1962; is that likely?

Mr. **Robertshaw**. I do not think he would have been. I think he has a legal adviser, like everybody on the Lawyers' Committee was.

Senator **Biden**. OK. Now, further, I believe you have testified or stated to other authorities that not only do you not recall the fact that he would be a particular adviser on a—challenger on a particular election day, but that he would not even go in the field to settle disputes; is that your impression?

Mr. **Robertshaw**. No, I think that we lawyers would go occasionally to the precincts, and as I say, read the code and advise the Republican officials at the particlar precinct what the law was, when they had a question. I think that is what Mr. Randolph said, also.

Senator **Biden**. I know that. But according to a transcript of a meeting you had with the FBI, that is not what you said?

Mr **Robertshaw**. What did they—I never saw the transcript that they put down.

Senator **Biden**. Oh, I see.

Mr. **Robertshaw**. I got in late, and they did not have it typed.

Senator **Biden**. Referring to you: He stated that he did not even recall seeing Mr. Rehnquist on this particular election day and added that, as chairman of the committee, it would not have been his role to go into the field and settle disputes, much less challenge voters, end of quote.

Mr. ROBERTSHAW. I do not recall seeing Bill Rehnquist, today, sitting now, on that election day. I remember going over to the county headquarters. But I cannot sit here and testify under oath I saw him.

Senator BIDEN. You do not recall seeing him at the county headquarters?

Mr. ROBERTSHAW. No, I do not.

Senator BIDEN. And you do not recall, Mr. Staggs, him leaving the headquarters, except when you sent him to Bethune precinct; is that correct?

Mr. STAGGS. Are you talking to me, sir?

Senator BIDEN. Yeah, I am sorry.

Mr. STAGGS. I am sorry.

Senator BIDEN. You do not recall Bill Rehnquist—called him Bill in that context at the time—Bill Rehnquist leaving—you say you were at the party headquarters all day?

Mr. STAGGS. Most of the day, in and out, yes, sir. 2314 N. 32d Street.

Senator BIDEN. Great address.

Mr. STAGGS. I know, because I owned the building.

Senator BIDEN. Do you still own it?

Mr. STAGGS. Nope.

Senator BIDEN. Did you get a good price for it?

Mr. STAGGS. Nope.

Senator BIDEN. You state that you were there most of the day. And it is your recollection that Bill Rehnquist was also there most of the day.

Mr. STAGGS. Most of the day, that is correct. He also was in and out with his regular committee. And most of the day, we were both there.

Senator BIDEN. How many times would you guess he was in and out? Some 2, 5, 10, 20, 50 times?

Mr. STAGGS. Twenty-four years later, I could not say.

Senator BIDEN. OK, fair enough.

Now, let me ask you: You have all——

Mr. STAGGS. Senator, may I add one point to what he said?

Senator BIDEN. Yes.

Mr. STAGGS. I can almost categorically state that Bill Rehnquist did not do any challenging as such. Because we had the—the challengers had to have a signed affidavit that they were a legally appointed challenger. And it had to be signed by the county chairman, which I was.

And I do not recall ever signing an affidavit for Bill Rehnquist to be a challenger, because he was chairman of our legal committee.

Senator BIDEN. You had the authority to make him a challenger? I mean, it was your decision to decide who the challengers were?

Mr. STAGGS. No, it was my authority to sign an affidavit that they were a legal challenger.

Senator BIDEN. Well, that is what I mean.

Mr. STAGGS. The committee, and even our district chairmen and others possibly——

Senator BIDEN. The Republican Party chose the challengers?

Mr. STAGGS. What?

Senator **Biden**. The Republican Party chose the Republican challengers; correct?

Mr. **Staggs**. OK. Now, there has been extensive testimony about how well respected and how well known Bill Rehnquist was.

I mean, do you doubt whether anybody—would any Democrat—let me ask you, Mr. Chairman: Would any Democrat have challenged Bill Rehnquist's right to be a challenger?

Mr. **Maggiore**. I would say that they would because of the fact that he was not as renowned then as he is now.

Senator **Biden**. Oh, I know that.

Mr. **Maggiore**. And I do not think a lot of people in the Democratic Party would have known him.

Mr. **Staggs**. Senator, if I may, I would like to answer that, too.

Senator **Biden**. Sure.

Mr. **Staggs**. Because the judge and inspector, the judge, marshall, and inspector, the three—and clerk—the officers of the election board would require the presentation of this affidavit. So they would not let anyone else challenge in that precinct——

Senator **Biden**. But can you swear under oath you know for certain Bill Rehnquist did not have such a signed affidavit?

Mr. **Staggs**. I would say to the best of my knowledge that he did not have one, because I know I did not sign one. I will put it that way.

Senator **Biden**. Recollection is difficult this far out, I acknowledge. Obviously, the recollection was difficult nine years out——

Mr. **Staggs**. That is right.

Senator **Biden** [continuing]. When you signed a sworn affidavit that was incorrect.

Let me ask one last question. Can any one of you state categorically that you know for a fact that Bill Rehnquist did not challenge any voters on election day, 1962? Not what you think about him, what you feel about him, what you know about him.

Can you state categorically that he did not challenge anyone on that election day?

Mr. **Randolph**. How could you answer that categorically when not one of us was with him all day?

Senator **Biden**. Valid point. Valid point. Very valid point. Thank you very much.

None of you were with him all day, correct?

Mr. **Randolph**. Right.

Senator **Biden**. None of you were with him even most of the day, correct?

Mr. **Staggs**. I was probably with him most of the day, but I was not with him all day.

Senator **Biden**. Probably or were?

Mr. **Staggs**. I was with him most of the day, but I was not with him all day.

Senator **Biden**. Were any of the rest of you with him most of the day? Were any of the rest of you with him even an hour that day? For what, an hour that day?

Mr. **Turner**. As I recall, Senator, we visited several precincts with Justice Rehnquist during the course of a day, precincts who were having problems. And he did, as I indicated in my testimony, what he was expected to do. He tried to address the problem. Sometimes it was a question of credentials, sometimes it was a question of rights of Republican election officials or challengers. And we saw nothing that even bordered on that type of activity.

So I would guess that we were probably with him as much in the field as anyone that day. And as I indicated previously, there was no indication that he had the slightest proclivity to challenge?

Senator BIDEN. No; I understand that and I acknowledge that. You all believe very strongly that he did not have the proclivity, and you stated the reasons why. I just want to make sure I got the record straight here, that in fact, none of you can categorically state that he did not. Not that I expect it. You should not be able to unless you were with him all day, as you point out

That is the only point I want to make, and I will yield to my colleague from Ohio.

Senator HATCH. Senator Metzenbaum.

Senator METZENBAUM. I just have a few questions.

First of all, we all agree, as I understand, that Staggs sent Mr. Rehnquist to the precinct on the day in question; Is that correct? Do any one of you take issue with that?

Mr. STAGGS. If the day in question is November 6, 1962?

Senator METZENBAUM. That is correct.

And is it also agreed that none of you in this room were with him on that occasion, when he went to the booth—when he went to the voting place on November 6, 1962, dispatched there by Mr. Staggs?

Senator HATCH. Well, Mr. Cassidy was there.

Senator METZENBAUM. Well, just a moment

Mr. CASSIDY. I was there. I was not with him.

Senator HATCH. You were in the same room with him

Senator METZENBAUM. Now, Mr. Cassidy, did you see Mr. Rehnquist?

Mr. CASSIDY. I do not know Mr. Rehnquist.

Senator METZENBAUM. You would not have recognized him if you saw him?

Mr. CASSIDY. No, sir.

Senator METZENBAUM. And you actually were at the polling place from early morning—the polling area from early morning until about 3 o'clock; is that correct?

Mr. CASSIDY. Yes, sir.

Senator METZENBAUM. But you were not always in the polling booth itself, or was there a booth—you were not actually where the votes were being cast?

Mr. CASSIDY. No; I was outside other than probably a total of an hour, a little over an hour, on the two calls that I went inside.

Senator METZENBAUM. In other words, actually, after the Bentson incident, you walked outside the school by yourself. And it appeared the trouble had ended. You then left the school grounds, pursuant to the Phoenix Police Department policy, that other than intervening in disturbances or to vote, uniformed officers were to avoid the voting areas of polling locations. That you then continued with your normal duties, remaining in the area of Bethune School, due to the fact that the individuals involved in the initial incident stayed at the school.

Then a few hours later, you received another dispatch to respond to Bethune School regarding an assault. Upon your arrival, you saw Bentson yelling back and forth in what appeared to be the same group of individuals as before, with the exception of two white males who were not present earlier.

Do you know who those two white males were earlier?

Mr. STAGGS. No, sir.

Senator METZENBAUM. And one of them might have been Mr. William Rehnquist?

Mr. CASSIDY. I doubt it from the description, but I have no idea. I heard their names; I just do not remember what they are. And I did not know the two individuals. I believe they are in the police report, listed.

Senator METZENBAUM. But you do not know whether it was or was not——

Mr. CASSIDY. I did not make out the report, no, sir.

Senator METZENBAUM. Now, we know that at one point in the day——

Senator HATCH. Would you yield for just one second.

Senator METZENBAUM. No, no.

Senator HATCH. Mr. Maggiore can clarify that. He can tell you who they were.

Senator METZENBAUM. No; I do not want——

Senator HATCH. Let us get the truth.

Senator METZENBAUM. Now, you just stay out of it when I am inquiring.

Senator HATCH. Wait.

Senator METZENBAUM. Just a moment. You stay out of it while I am inquiring. You have a tendency to want to interrupt.

Senator HATCH. I may not be Senator Thurmond, but I am the chairman.

Senator METZENBAUM. I know you are the chairman, but you are not going to interrupt me.

Senator HATCH. Wait a second, Howard. Let us be fair. You have asked him for names that were there. Mr. Maggiore can identify them for you.

Senator METZENBAUM. Mr. Maggiore was not there.

Senator HATCH. He knows who they were. Why don't you let him answer? He is a Democrat.

Senator METZENBAUM. Mr. Maggiore was not there. I will get to Mr. Maggiore in due time.

Senator HATCH. We will let you have your way.

Senator METZENBAUM. Now, you just hold your cool, Mr. Chairman. We will get along just fine.

So that you were in and out, and in fact Mr. Rehnquist might have been one of those two white males, or he also might have been there at a time different when you were away from the precinct entirely; is that correct?

Mr. CASSIDY. Yes.

Senator METZENBAUM. I do not think that I have any further—yes, I do. I want to repeat Senator Biden's question, because I do not think all of you answered. There was sort of a silence. And I like the way Senator Thurmond did it.

Do any of you know for certain that William Rehnquist was not involved in challenging voters on November 6, 1962, in the Bethune Precinct or any other? Do any of you know for certain that he was not involved?

Mr. RANDOLPH. Senator, I am going to take a crack at that.

We lawyers have to operate sometimes on the law of probabilities. And I am just telling you, the law of probabilities is so overwhelming that he was not there challenging, with that angry mob in there, and with the trouble we had had straightening it out in the morning with the deputy county attorney who had set the ground rules we were anxious to have set so we could operate in there, that he would have been an absolute fool to have gone in there and try to challenge any time that day.

And I would say the overwhelming probability is so compelling that he did not go there that I can say categorically that he was not there.

Senator METZENBAUM. We know that he was there for an hour and a half, do we not?

Mr. STAGGS. Not necessarily, no.

Senator METZENBAUM. No? Well, the reason I said that is because Mr. Staggs stated that Rehnquist returned about an hour and a half later to Republican county headquarters——

Mr. STAGGS. I said that he was gone from county headquarters about an hour and a half. It is a half—hour drive from Bethune from my—from 2314 N. 32d to Bethune's precinct.

Senator METZENBAUM. I will not quibble about the minutes.

Mr. STAGGS. So he could not have been there more than half an hour at the maximum.

Senator METZENBAUM. I am sorry, I do not remember——

Mr. RANDOLPH. George Randolph. Randolph's my name.

Senator METZENBAUM. Mr Randolph. Mr. Randolph, the law of probability, according to you, was that he would not do that. Because that was not what you had planned to do; that is not the way it worked out.

But you were here today when you heard five witnesses under oath, and we have other statements as well from other individuals; there were five witnesses under oath, one a very prominent lawyer, one a doctor of psychology, one another lawyer in Arizona, one a State Senator, and one—and I forgot the other one. But they all said they saw him making the challenges.

Now, does that bother you about your law of probability?

Mr. RANDOLPH. Yes, sir. I'm glad you addressed that, because I didn't get to finish my testimony. Dr. Sydney Smith, I think, was mistaken, because, first of all, Bill Rehnquist was not a certified challenger in 1960——

Senator METZENBAUM. Did you have to——

Mr. RANDOLPH [continuing]. Or in 1962.

Senator METZENBAUM. Let me just ask you a question.

Senator HATCH. Well, let him answer the question.

Senator METZENBAUM. All right, I'm going to. But Mr. Staggs made much about being a certified challenger. And let's just put Mr. Rehnquist out there, put you out there, put anybody out there—you go up to some black person or some Mexican, Mexican-

American, and you hand them a card and you say: "Have you got a right to vote?"

That person isn't going to say: "Where's your challenger certificate, have you got the affidavit?"

Mr. **Randolph**. May I answer your question?

Senator **Metzenbaum**. You don't have to do that; he's a big man, he says: "I challenge you, I don't think you have a right to vote."

Mr. **Randolph**. May I answer your question? It's about a five-part question.

No. 1, Mr. Staggs said that he sent him down there, but that he was there less than half an hour. I told you that in the morning——

Senator **Metzenbaum**. He doesn't say that, he didn't say that.

Mr. **Randolph**. In the morning we went and took the county attorney in there and we set the ground rules, and we got peace in the community and we all left. We left a competent police officer there who kept the peace all day, at least until it erupted at 2 o'clock in the afternoon.

OK, to go on, Smith, I think, was mistaken. I know that Brosnahan—in my own mind, Brosnahan was mistaken. I think that Mr. Pena was certainly mistaken, because he's talking about Butler precinct and you're talking about Bethune precinct, and if Mr. Rehnquist was directing the program from headquarters, he certainly would not have called headquarters for instruction as to how to do the challenging, when he's the one that knows the law and who everybody else is calling.

Furthermore, we couldn't have spared him from headquarters for as long as Mr. Pena says it took down there to go in there and challenge the voters and go in the principal's office and come back out and double up his fist—I've never known Mr. Rehnquist to be pugilistic.

I just think his testimony, with the law of probability, is just incredible. And so I just don't think you can believe him.

Senator **Metzenbaum**. All right, they are all unbelievable or they are mistaken; is that your point?

Mr. **Randolph**. That's my point.

Mr. **Staggs**. Senator, I would like to answer your question, if I may.

I cannot either categorically state that I know Bill Rehnquist did not challenge anybody in the Bethune precinct, but I can say that it is highly unlikely. If he did, the Democrat election board officials in that precinct were highly negligent, because he would have had to show that signed authorization affidavit in order to be able to challenge anybody, any voter, in that precinct.

So based on that I would say that it's highly unlikely that he did.

Senator **Metzenbaum**. Well, you heard Mr. Mirkin say that he got into a dispute with Mr. Rehnquist; you heard Senator Pena indicate that he had a confrontation with Mr. Rehnquist.

Mr. **Staggs**. Mr. Pena also stated that was in 1964, not 1962.

Senator **Metzenbaum**. He could be mistaken about that.

Mr. **Staggs**. Yes.

Senator **Hatch**. I do not recall Mr. Mirkin saying that.

Senator **Metzenbaum**. He certainly knew who Mr. Rehnquist was.

Senator HATCH. I do not recall Mr. Mirkin saying anything like that. Am I wrong in that?

Senator METZENBAUM. No; Mirkin said he got into a dispute and that he was going to call the sheriff, and I think he said to them that the sheriff is not a Republican or something of the kind—I don't think that was particularly relevant, but the point that I'm making is that he was concerned enough about it that he couldn't handle it.

Mr. STAGGS. Well, I heard Mr. Mirkin's testimony this afternoon, too, and I highly question that he knew what the hell he was talking about at all.

Senator METZENBAUM. Now, as I get it, Staggs doesn't think Mr. Mirkin knows what the hell he's talking about, and this gentleman over here doesn't think that any of these people told the truth when they came before us today. And so I have no further questions, I guess, Mr. Chairman.

Senator DECONCINI. Mr. Chairman.

Senator HATCH. Senator DeConcini.

Senator DECONCINI. Mr. Chairman, I have one further question.

Senator HATCH. Will you question the two witnesses or the two people that Senator Biden——

Senator DECONCINI. No; I just have a question for Mr. Cassidy.

Mr. Cassidy, I just delivered to you what appears to be the Phoenix Police Department report of November 6, 1962.

Mr. CASSIDY. Yes, sir.

Senator DECONCINI. Can you just tell me if that is the police report from that particular day that you were on duty there?

Mr. CASSIDY. Yes; it is the report, made out by the officer that was the first one at the school.

Senator DECONCINI. And have you read that report?

Mr. CASSIDY. Yes; I have.

Senator DECONCINI. Does that make reference to the two white males that you saw there?

Mr. CASSIDY. Yes; it does.

Senator DECONCINI. And is Mr. Rehnquist's name listed in that report anyplace?

Mr. CASSIDY. It's nowhere in the report, no, sir.

Senator DECONCINI. Are the two white males identified in that report?

Mr. CASSIDY. Yes; they are.

Senator DECONCINI. I thank you. I have no further questions.

Senator HATCH. Mr. Maggiore, do you know who they are?

Mr. MAGGIORE. Yes; I think I do.

Senator HATCH. We could have saved a lot of time if we had let you just talk a few minutes ago.

Mr. MAGGIORE. Yes; they were both—I hate to say, they were both associates of mine, about equal to Mr. Bentson on the other side. [Laughter.]

Senator HATCH. I am not sure that I have any more questions.

What we have here are a lot of sincere people trying to reconstruct what happened 24 years ago. That is in and of itself a very difficult thing to do. The Democratic panel reconstructed it in such a way as to be, they thought, detrimental to Mr. Rehnquist. You have testified here today that is very positive to Mr. Rehnquist, all of you.

A number of you are Republicans. They were all Democrats. They were all very active Democrats. Some of you are very active Republicans, or most all of you are—except for Mr. Maggiore and Mr. Cassidy, whose testimony I find not only credible but very important.

Anybody who looks at this reasonably must conclude there have been some massive cases of mistaken identity, mix up of facts and misunderstandings.

The one thing that bothered me about Mr. Brosnahan's testimony was that with all the evidence about the Bethune School incident one FBI report, one police report, his own statements in the Washington Post that it was Bethune, the Nation article, he kept on denying that it was there.

Senator **Metzenbaum**. To keep denying what?

Senator **Hatch**. That it was at the Bethune School, and to admit that that was a real potential. That really bothered me.

It isn't important what bothers me. What's important here is that we have a marvelous individual who has served this country well for the last 17 years. I almost do not care what happened 24 years ago, even if the allegations of the five Democrats were true—and they are not. It is pretty apparent that they are not.

The fact is—and I am not accusing them of trying to distort or mistake—that it is tough to remember what happened 24 years ago. We have people here who are very creditable. Maybe we ought to get down to what the real issues are. Is Mr. Justice Rehnquist capable, able, and worthy to be the Chief Justice of the United States Supreme Court? The answer to that is clearly an unequivocal yes, at least from the standpoint of the Bar Association. They gave him the highest qualified rating that they can give anybody.

Let me ask a couple of other questions to all of you.

Did you or any one of you ever suggest that then Mr. Rehnquist challenged any voter? Did any of you ever suggest that? Just say yes or no.

Mr. **Randolph**. No.

Mr. **Maggiore**. No.

Mr. **Turner**. No, sir.

Mr. **Staggs**. Definitely not.

Mr. **Marshall**. No.

Mr. **Robertshaw**. No.

Senator **Hatch**. You were the principal people at the time involved, at least on the Republican side, and you, Mr. Maggiore, on the Democrat side, and you, Mr. Cassidy, on the law enforcement side. Did any of you ever hear anybody suggest that Mr. Rehnquist challenged any voter?

Mr. **Randolph**. Not until this afternoon, your honor, at this committee hearing.

Senator **Hatch**. Mr. Maggiore.

Mr. **Maggiore**. No.

Senator **Hatch**. Your answer is no?

Mr. **Maggiore**. No.

Senator **Hatch**. And that's unequivocal, isn't it, Mr. Maggiore?

Mr. **Maggiore**. That's unequivocal.

Senator Hatch. OK. Mr. Cassidy.

Mr. Cassidy. No, sir.

Mr. Turner. No.

Mr. Staggs. No, sir; not until the allegations I heard today.

Mr. Marshall. No.

Mr. Robertshaw. No.

Senator Hatch. I find it a little incredible that those allegations suddenly come up in the middle of something like this, when they could have come up in 1971. There are answers to that, I suppose, but I think they are pretty feeble answers.

Mr. Staggs. They could have come up in 1962.

Senator Hatch. They could have, but they did not.

Mr. Staggs. After the election.

Senator Hatch. Mr. Maggiore, you were there. Let me ask each of you. We will just go from one side to the other again—yes or no. Did Mr. Rehnquist, in 1962, or any other time that you know of, ever act improperly or outside his duty as a legal advisor.

Mr. Randolph. No.

Mr. Maggiore. No.

Mr. Turner. No.

Mr. Staggs. As the legal counsel of the Republican Party of Maricopa County, he was highly ethical. I never knew him to be otherwise.

Mr. Marshall. No.

Mr. Robertshaw. No.

Senator Hatch. We have asked the FBI to attempt to locate the alleged FBI agent who called Senator Biden's office. The call came from a bar in New York City. [Laughter.]

The FBI says they have no record of an FBI agent named McCurdy, but they will continue to look. You may remember that Mr. Brosnahan thought that he knew the name, and that should be pointed out.

Senator Heflin. Mr. Chairman, I have a couple of questions I'd like to get cleared up.

Senator Hatch. Senator Heflin.

Senator Heflin. Mr. Staggs, was there anybody else other than you that could certify challengers or officials to represent your party at polling places?

Mr. Staggs. When you say "certify," are you referring to signing the authorization?

Senator Heflin. Whatever you signed, I don't know. An affidavit, you keep talking about this affidavit.

Mr. Staggs. Well, every challenger had to have in his possession a signed authorization, affidavit authorization, to present to the judge in the voting precinct. So, to answer your question, no—no one else had any authority.

Senator Heflin. So this affidavit of challengers, was it on a card?

Mr. Staggs. No; it was on an 8½ by 11 mimeograph sheet.

Senator Heflin. Was there any other authorization that you signed?

Mr. Staggs. Senator, it also was on the Republican County Committee letterhead. I wish I had kept one of them.

Senator Heflin. Was there any other document that you would have signed that could have authorized anyone to be an attorney to assist challengers? In other words, if you sent an attorney to a precinct and the precinct judge didn't know him, what credentials would he have presented to the judge to show that he was a representative of the Republican Party?

Mr. **STAGGS**. Well, the legal committee had no affidavit or authorization. It was not required. But he would not be able to challenge, unless that person had a signed affidavit. If he went there as a lawyer, he would not have any identification other than his own personal identification.

Senator **HEFLIN**. Well, Mr. Cassidy, let me ask you, if you remember during the time that you were at this polling place, whether anybody came, and identified himself as an FBI agent, or whether anyone else identified himself to you as an assistant U.S. attorney?

Mr. **CASSIDY**. No, sir; they didn't identify themselves to me, but, as I said, there were numerous people coming all day long, representatives of both parties. Mr. Bentson told me he called the FBI, he told me he called the attorney general. So it wouldn't surprise me that they showed up, but I don't know which ones they were.

Senator **HEFLIN**. You mentioned something about you expected the FBI to come, but that was left a little bit up in the air. What did you mean? You seemed to have some recollection about an FBI agent that was coming to this polling place.

Mr. **CASSIDY**. I don't recall mentioning anything like that.

Senator **HEFLIN**. Well, maybe I misunderstood what you said. But you don't recall anything about an FBI agent coming or going to be there or anything else at this polling place?

Mr. **CASSIDY**. I recall Bentson saying that he was going to call an FBI agent. Whether one came or not, I don't know.

Senator **HEFLIN**. I believe that's all.

Senator **METZENBAUM**. Mr. Chairman.

Senator **HATCH**. Let us turn to Senator Metzenbaum. Let us try and wrap this up. We have one more witness to go.

Senator **METZENBAUM**. I will. I wasn't going to say anything more until you went into your soliloquy.

Senator **HATCH**. That is fine. We will have a soliloquy from you.

Senator **METZENBAUM**. I think maybe we should, because I think, Mr. Chairman, you have attempted to compare the five witnesses under oath who testified that they saw Mr. Rehnquist at the voting booth and described for this committee what they saw, and then attempted, in the instance of Mr. Brosnahan, to suggest that, well, he didn't even know where he was, he didn't know what precinct—and he said Brosnahan and an unknown special agent of the Phoenix office of the FBI went to south Phoenix to a school, possibly Bethune School——

Senator **HATCH**. I tried to get him to say that about a half hour here today, and he would not admit it.

Senator **METZENBAUM**. But that's what he said to the FBI.

Senator **HATCH**. I agree. That is what he said to the Washington Post, that is what he said to all kinds of other people. That is what everybody else says.

Senator **METZENBAUM**. And he said that here, too.

Senator **HATCH**. I do not think he did.

Senator **METZENBAUM**. He said that here, too. Now you bring in eight witnesses, no one of them in a position to say that Rehnquist didn't challenge the voters, except this one gentleman says, based on the law of probability, he doesn't think he would have done that, this gentleman over here saying he didn't think he would do that, and others saying they don't think he's that kind of a man.

But the facts are that five people—Brosnahan is a member of a major law firm on the west coast, I don't know him at all. But the fact is, 250 lawyers—and he comes all the way across country, nothing to gain, nothing to gain in coming this far—and an awful lot to lose, because you can't be in a law firm of 250 lawyers representing major corporations without probably 220 of them at least being Republicans, and pretty conservative people, and not very happy about his coming over here to testify. [Laughter.]

Senator **HATCH**. Not in Berkeley, CA. There are not 220 Republicans in the whole city.

Senator **METZENBAUM**. That's not so; that's a corporate law firm.

Senator **HATCH**. There might be.

Senator **METZENBAUM**. Then you have Mr. Smith, the professor or doctor, who says I came here because my children said I couldn't do otherwise. No big privilege to come before the Senate Judiciary Committee and have a bunch of Senators pick on you from one side to the other. The man is quite timid, as a matter of fact, and came here because he felt it was a public duty—he had to come here.

You have Mr. Pine, who is a Democratic political leader, business person, well respected in the community, his wife is just going to be a lawyer, testify unequivocally—unequivocally—about Mr. Rehnquist being there as a challenger.

You have Mr. Mirkin testifying—saying, indicating his support; he would vote to confirm him—he would vote to confirm him. But he made it clear, he saw what was going on there with Mr. Rehnquist. Here is a man who said I would vote to confirm him; he wasn't an unfriendly witness.

And then you had Senator Pena, who tells us about the confrontation and the difficulties and how the tempers rose on that occasion.

Did all five of these people just dream up this kind of thing? Mr. Chairman, you would like to make the issue what happened 30 years ago. I say to you today--I said it to you before—the issue is, Did Justice Rehnquist tell the truth to this committee in 1971? Did he tell it to this committee in 1986 with reference to these incidents? Did he do so with respect to the Jackson memo? Did he do so with respect to his being surprised when he learned that there were restrictive covenants in his Vermont property as well as his Arizona property?

Mr. Chairman, now I am ready to adjourn.

Senator **HATCH**. That is great. I knew I should not have given my soliloquy.

Senator **HEFLIN**. Well, I believe, since both of you have given them, call them all closing arguments, and I'm the only member of the jury still here. [Laughter.]

Mr. **STAGGS**. Mr. Chairman, may I make one short statement?

Senator **HATCH**. Yes.

Mr. STAGGS. I don't think Justice Rehnquist, my knowledge of him over the years—I don't think he is capable of saying anything except the honest truth.

Senator HATCH. I do not think anybody who has watched him really believes otherwise, except one or two members of this committee. I do not see how anybody can watch Mr. Justice Rehnquist, look at the reputation, the public service he's given——

Mr. STAGGS. People may not agree with him, but I think he has told the honest truth.

Senator HATCH. There is a man who stood all alone on a number of occasions and has had the courage to take on a lot of things. I do not think anybody really believes that he would deliberately lie.

You don't, do you Mr. Maggiore?

Mr. MAGGIORE. I think that the big argument that I would put is the fact that here I was the leader of the party and nobody told me anything. And they haven't denied it either today—that's what bothered me.

Senator HATCH. That bothers you about your own party members.

Mr. MAGGIORE. Yes.

Senator HATCH. It bothers me, too. A lot of inconsistencies in their testimony bother me, too. But I have to admit that I believe that everybody sincerely told what they thought to be true.

There is clearly a question here. It has to be resolved by any reasonable decent person in favor of the Associate Justice of the Supreme Court, even if you do give credibility to those who testified before.

And most of them were sincere.

Let me thank each of you. Mr. Maggiore, you are a former chairman of the Democratic Party in Maricopa County. If you were a sitting U.S. Senator, would you vote to confirm Mr. Justice Rehnquist as Chief Justice of the U.S. Supreme Court?

Mr. MAGGIORE. Yes; I would.

Senator HATCH. You have been practicing law for a long time. You have been a bankruptcy judge.

Mr. MAGGIORE. Yes; I have been a bankruptcy judge for 20 years.

Senator HATCH. I think you have been, outside of Mr. Justice Rehnquist, the single best witness in this whole hearing. I do not think anybody can doubt your sincerity or your integrity. There is nothing for you to gain here. You have traveled all across the country, too. I want to compliment you, Mr. Cassidy, and all my Republican friends. I want to compliment all of you for making the sacrifice to come.

Let's be decent about it; let's be fair about it. Let's look at the record of this man and the reputation he has.

We will take a 1-minute recess and then we are going to finish with our last witness. His name is Baly G. Thaper. We are going to give him 3 minutes.

[Brief recess.]

Senator HATCH. Our last witness is Mr. Baly G. Thaper. Welcome, Mr. Thaper. If you will proceed.

TESTIMONY OF BALY G. THAPER, NEW JERSEY

Mr. **Thaper**. I want to thank the committee for allowing me to speak. Mr. Rehnquist is a very great intellectual, he has done so many things, in different positions—he has been a law clerk, he has been in the Attorney General's Office, and he has done so many things which are outstanding.

And, in addition to the other qualities that he has, he has a very great quality as a strong administrator; he has management capabilities.

And at this time the courts require a very strong manager.

The Chief Justice has overall responsibility of all the courts.

Now, in the Supreme Court, in the Clerk's office, there is a lot of corruption and a lot of fraud. Several cases—in my case also—they never presented my petition to the Court, and issued bogus orders denying my petitions. I raised motions they refused to file. And they do several things.

In the Third Circuit Court of Appeals they have issued bogus orders, they have forged the signatures of judges, like Judge Hunter, Judge Adams, Judge Gibbons, and several other circuit judges—they forge the signatures.

And when I made motions to correct them, and they did not file my motions.

Similarly in the appellate division in New Jersey also, the appeal was in my favor. The other party—they gave her money, and she just changed the order and gave me a bogus order. Now the thing is going on there, and probably some people may be in trouble.

So this is the position.

The courts in the United States at this stage are in a very bad shape. The management has been very poor.

And I am sure, with the appointment of Justice Rehnquist, things will change.

Senator **Hatch**. Mr. Thaper, your time is up.

We will recommend that your matter be looked into. Senator Thurmond knew that you wanted to testify and that you had come in today and demanded to do so. He asked me to be sure and take your testimony at the end of the hearing.

We have your statement. We will put it in the record. We want to thank you for being with us.

Mr. **Thaper**. My request is——

Senator **Hatch**. We will have to end the hearing at this point, Mr. Thaper.

The Rehnquist hearing is finally over. Thank you.

[The committee adjourned at 8:24 p.m.]

APPENDIX

STATEMENT OF THE WASHINGTON LEGAL FOUNDATION ON THE NOMINATION OF JUSTICE WILLIAM REHNQUIST AS CHIEF JUSTICE OF THE UNITED STATES

The Washington Legal Foundation ("WLF"), a non-profit, public interest law and policy center, respectfully submits this statement to the Committee in connection with the nomination of William H. Rehnquist to be Chief Justice of the United States.

WLF, with some 200,000 members and supporters nationwide, engages in litigation, administrative proceedings, and publications and studies on a wide variety of legal and policy issues affecting the public interest. WLF is especially active in federal appellate litigation in general and Supreme Court cases in particular. We have participated in over 20 major cases before the Supreme Court over the past ten years, and are exceptionally familiar with the work of the Court and of its individual justices.

Objective testimony to WLF's knowledge regarding the Supreme Court's work is reflected in the fact that WLF attorneys are repeatedly called upon by television networks and radio stations to offer expert commentary on Supreme Court cases in news and informational programming.

While WLF does not take an organizational position on individual judicial nominations, we feel compelled by circumstances to submit our informed testimony on the excellence of Justice William H. Rehnquist as a jurist, a justice, and a faithful champion and defender of the United States Constitution. A person more qualified for the position of Chief Justice would be difficult to find.

William Rehnquist graduated first in his law school class at Stanford University; served successfully as law clerk to Supreme Court Justice Robert Jackson; was highly successful in private law practice in Phoenix, Arizona; excelled as an Assistant Attorney General of the United States; and has established himself as a genuine giant of constitutional jurisprudence during his fifteen-year tenure on the High Court. Perhaps the highest testimony of all is to be found in the openly-stated respect and affection extended to him by his brethren on the Court -- even though several of them differ sharply with him in terms of judicial philosophy. The other Justices, who know him best, are ungrudging in their recognition of his decency and his exceptional legal capacities.

Given these facts, one would assume that the confirmation of Justice Rehnquist should be swift, smooth, and uncontroversial. Yet a spate of insidious newspaper stories, based on innuendo and distortion, has strained to cast a cloud over this superb nomination. And a small group of partisan, ideological interest groups have openly stated their intent to use these nomination hearings as the basis for an all-out assault on Justice Rehnquist and his record.

This campaign of smear and innuendo must not be allowed to sully the reputation of a great Justice and soon-to-be Chief Justice. The Committee should not allow the legitimate discussion and debate of the confirmation process to provide the forum for insidious and pointless character assassination.

Much of this malicious campaign depends upon the distortion and exploitation of certain private memoranda written by Justice Rehnquist when he was law clerk for Supreme Court Justice Jackson in the early 1950's. The criticism centers on claims that these memoranda reflect views that were insufficiently progressive -- by present day standards -- with respect to racial integration issues.

The lame and desperate nature of this line of criticism underscores the illegitimacy of this campaign to villify and slander a great American. These memoranda were examined at length 15 years ago, when Justice Rehnquist's record and character were exhaustively scrutinized in his 1971 confirmation hearings for Associate Justice.

After those hearings, the Senate Judiciary Committee voted favorably on the Rehnquist nomination by a 12 to 4 vote. The full, Democratic-controlled Senate then voted to confirm him by a margin of 68 to 26.

The truly relevant evidence for purposes of the present nominationis found in the 15 years of Justice Rehnquist's crisp and lucid opinions, which set forth his legal views and constitutional philosophy for all to see. With such a clear and public record of Justice Rehnquist's actual performance as a sitting Justice, it is nothing short of absurd to ascribe any significance to obscure and private clerks' memoranda of the remote past. The same holds true for the trumped up stories inaccurately alleging some sort of insensitivity or impropriety by Rehnquist in connection with poll-watching activities in Arizona. It is recycled irrelevance.

Further, with respect to the arguments regarding integration contained in the criticized law clerk's memoranda, it has been demonstrated that these were presented as "devil's advocate" positions to help sharpen the issues, rather than an expression of the young Rehnquist's personal views. Even if one assumes that the memoranda *did* involve Rehnquist's personal views, those views reflected what was then a perfectly moderate and mainstream position in the context of those times.

Only recently, Supreme Court Justice William Brennan -- whose legal positions are often at odds with those of Justice Rehnquist-- was asked what kind of Chief Justice he thought Rehnquist would be. Without hesitation, Justice Brennan stated that Rehnquist would be an excellent Chief Justice.

Do the partisan political activists who have been attacking the Rehnquist nomination know better than Mr. Justice Brennan? We think not. By any fair and objective measure, Justice Rehnquist is superbly, perhaps uniquely, qualified to serve as Chief Justice in this critical era.

Thank you for considering the Foundation's views.

Daniel J. Popeo
Daniel J. Popeo
General Counsel

Paul D. Kamenar
Paul D. Kamenar
Executive Legal Director

George C. Smith
George C. Smith
Director of Litigation

Michael P. McDonald
Michael P. McDonald
President, Legal Studies Division

Dated: July 29, 1986

Statement of Endorsement for

The Honorable William H. Rehnquist
Associate Justice of the Supreme Court

for

Chief Justice of the United States

Submitted by:

Beverly LaHaye
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Concerned Women for America, (CWA), the nation's largest non-partisan women's activist organization, strongly supports President Reagan's nomination of U.S. Supreme Court Associate Justice William H. Rehnquist for Chief Justice of the United States. CWA was founded in 1979 to protect the rights of the family and America's traditional moral values as set forth by the Framers of the Constitution. With over 550,000 members in all fifty states, CWA's membership exceeds the combined total memberships of the National Organization for Women, the Women's Political Caucus, and the League of Women Voters.

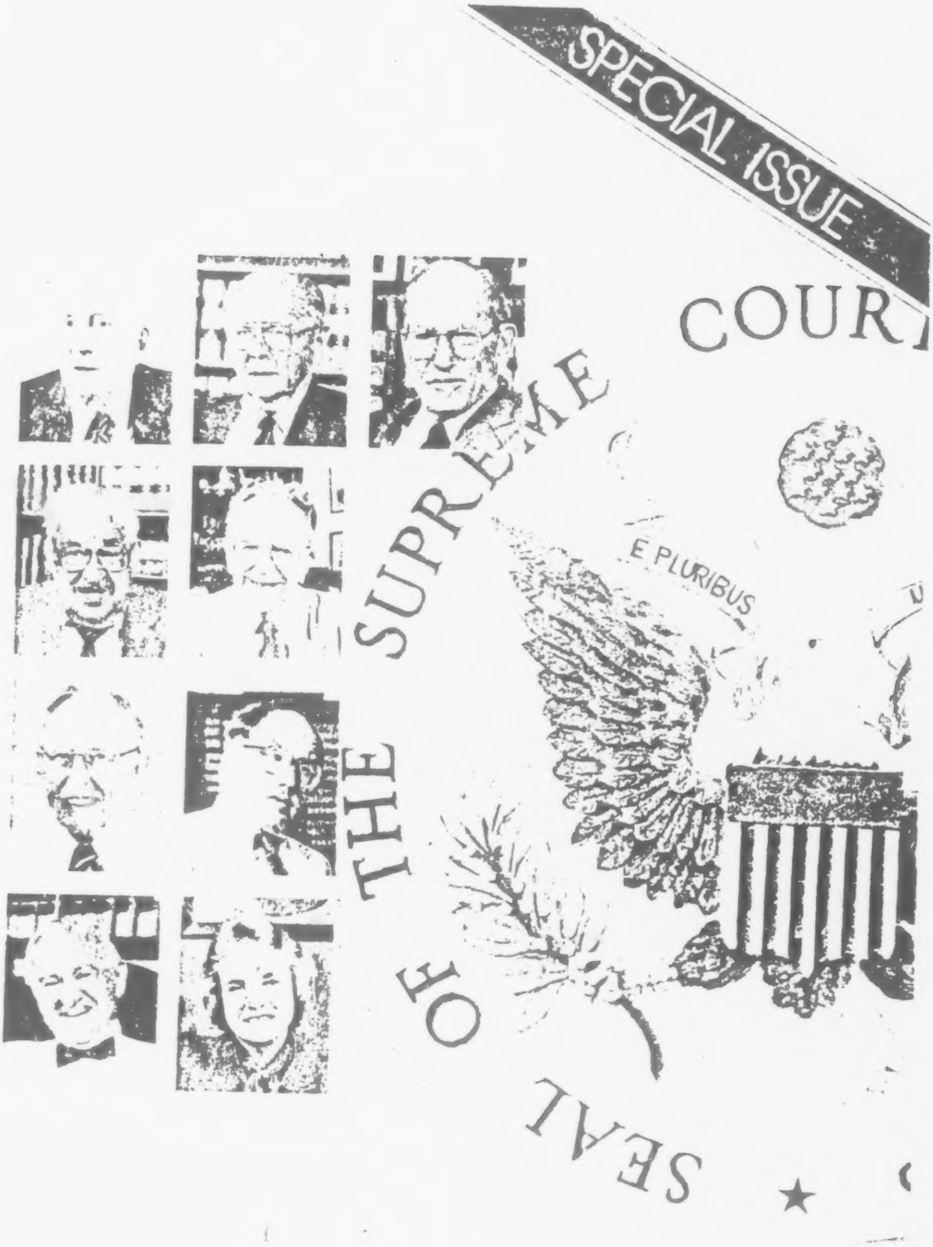
Although Justice Rehnquist's great intelligence and extensive legal experience adequately qualify him for the position of Chief Justice, it is his dedication to judicial retraint which we hold in highest esteem. Justice Rehnquist's record demonstrates his belief that the Supreme Court should interpret the Constitution in light of the intent of the Framers, and not manufacture new rights absent any textual justification.

For example, Justice Rehnquist has refused to read a "right to abortion" or a "right to sodomy" in the Constitution. (See Roe v. Wade and Bowers v. Hardwick). In those two cases, Justice Rehnquist relied on the overwhelming historical evidence that the Framers intended to leave these areas to state legislatures to decide.

Justice Rehnquist is strongly committed to support of religious liberties and a historically-accurate understanding of the Establishment Clause. (See, for example, Justice Rehnquist's position in Bender v. Williamsport School District and his dissent in Wallace v. Jaffree).

This balanced, thoughtful approach to constitutional interpretation makes Justice Rehnquist an unusually well-qualified selection for Chief Justice. His committment to the historical understanding of the intent of the Framers maintains the balances struck by the Founding Fathers through the Constitution's concepts of federalism and separation of powers. The people, through their elected officials, then can properly initiate constitutional changes through the amendment process. Justice Rehnquist's jurisprudence resists the concept of "evolving law," that has the Supreme Court change the Constitution, as it sits as a perpetual, unelected Constitutional Convention.

Based on his intellectual abilities, experience, and deep understanding of the Constitution, Concerned Women for America urges the Senate to confirm William Rehnquist as the next Chief Justice of the United States.


SPECIAL ISSUE
SEAL OF THE SUPREME COUR
E PLURIBUS

Justice William H. Rehnquist

A Key Fighter in Major Battles

By A. E. Dick Howard

RICHARD Nixon, who put him on the Supreme Court, had some trouble remembering his nominee's name; once he called him "Renchburg." Critics of the nomination, however, had little trouble remembering William H. Rehnquist's name. Delving into his political activities and philosophy, they were quick to condemn.

The minority report filed by members of the Senate Judiciary Committee declared that Rehnquist had "failed to show a demonstrated commitment to fundamental human rights," that he was "outside the mainstream of American thought," and therefore should not be confirmed.

Once on the Court, Justice Rehnquist soon became known for his willingness to stake out a position in the strongest of terms. Within months of taking his seat, Rehnquist began arguing that the Court should confine its uses of the 14th Amendment by consulting the intent of its framers. Thus he argued, for example, against making alienage a "suspect classification" for the purposes of 14th Amendment review. *Sugarman v. Dougall*, 413 U.S. 634 (1973).

Nor was Rehnquist deterred by finding himself the only dissenter in a case. For example, he was the sole dissenter when the Court overturned, on equal protection grounds, a Louisiana statute that denied unacknowledged illegitimate children recovery rights under a workers' compensation statute on their father's death. Here, as in the alienage case, Rehnquist found the majority's use of the 14th Amendment devoid of "any historical or textual support." *Weber v. Aetna Casualty & Surety*, 406 U.S. 164 (1972).

From his earliest days on the Court, Rehnquist has stirred strong reactions, especially among those who admire the work of the Warren Court. Four years after Rehnquist's arrival at the Court, David L. Shapiro, a Harvard professor, wrote an article in which he criticized the justice for, among other sins, "unwarranted" deference to state institutions and "tacit abandonment" of evolving constitutional protections.

Justice Rehnquist and his clerks.

Fond regards

Yet, for all his detractors, perhaps no justice at the Court generates more genuine warmth and regard among both his colleagues and others who work at the Court. A former law clerk to Justice White describes Rehnquist as "the nicest person at the Court. Within a few weeks of the Term's commencement, Justice Rehnquist knew all the clerks by their first names." A justice says of him, "Bill has an exceptional mind. No member of the Court carries more constitutional law in his head than he does."

As one looks back over the nearly 15 years Rehnquist has been on the bench, the evidence mounts that he has become one of the most influential members of the Court. One of Rehnquist's colleagues suggests that one reason for Rehnquist's influence is the chief justice's inclination to assign him many of the important opinions.

Examples include the Iranian assets case, the decision rejecting an attack on all-male registration for the draft, and decisions limiting the reach of the *Miranda* doctrine and of the Fourth Amendment's prohibitions against unreasonable searches and seizures. Professor Owen Fiss and writer Charles Krauthammer have declared that there is a "vision" that informs the work of the Burger Court and that the "source of that vision" is Justice Rehnquist.

What are some of the qualities that William H. Rehnquist brings to his work as a justice of the Supreme Court? One is a powerful intellect. Sen. Edward M. Kennedy, an opponent of Rehnquist's confirmation, paid him the compliment (intending irony, no doubt) of being "a man with a quick, sharp intellect, who quotes Byron, Burke and Tennyson, who never splits an infinitive, who uses the subjunctive at least once in every speech . . . ."

Students of the Court's opinions see a good mind at work. Professor Shapiro calls Rehnquist "a man of considerable intellectual power and independence of mind." Those who work with Rehnquist at the Court recognize his intellectual qualities. A former law clerk to Justice Brennan comments that he found Rehnquist to be "a fantastic writer, one who knows his own mind."

Consistent jurisprudence

Another key to Rehnquist's place on the Court is his well-formed jurisprudence. The Court during Rehnquist's time has not been noted for the coherence and consistency of its opinions. Sometimes judicial restraint seems to be the hallmark (as in refusing to use the equal protection clause to decree that states must correct imbalances in school financing between rich and poor school districts). Other times, judicial activism seems to be the order of the day (as in finding a right to privacy that includes a woman's decision to have an abortion). Often the decisions of the Burger Court have been characterized by shifting and unpredictable voting partners.

In a Court often given to ad hoc and pragmatic decisions, a justice of firm, focused views stands out. Just as Hugo L. Black fashioned a comprehensive jurisprudence in another era on the Court, so does Rehnquist have a set of precepts to steer his votes and opinions.

Central to Rehnquist's views is his objection to the kind of judicial activism often encompassed by the phrase, "the living Constitution." In a 1976 lecture, Rehnquist objected to the notion that "nonelected members of the federal judiciary may address themselves to a social

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A. E. Dick Howard is the White Burkett Miller Professor of Law and Public Affairs at the University of Virginia.

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problem simply because other branches of government have failed or refused to do so." For Rehnquist, such a freewheeling approach to constitutional law is incompatible with a democratic society.

"Original intent"

Fidelity to the "original intent" of the framers is a cornerstone of Rehnquist's constitutional interpretation. For Rehnquist, the Constitution's language is not infinitely elastic, to be shaped to the perceived needs of succeeding generations. Interviewed for this article, Rehnquist summed up his belief in the centrality of original intent as a search for "what the words they [the framers] used meant to them."

Thus Rehnquist has emphasized that the principal purpose of those who drafted and adopted the 14th Amendment was to prevent invidious discrimination on the basis of race. Hence, the Court has no warrant extending the reach of that Amendment to other problems without historical evidence that the framers meant to place them within the Amendment's compass.

Belief in the virtues of federalism is a *leitmotif* that runs consistently through Rehnquist's opinions. He invokes both historical and structural arguments to support the Court's protection of the prerogatives of the states. The structural argument is especially interesting, for it does not rely solely on the language of the Constitution. Rehnquist maintains that the "implicit ordering of relationships" within the federal system yields "tacit postulates" of federalism that are "as much ingrained in the fabric of the document as its express provisions. . . ."

One should not overemphasize the extent to which an "agenda" shapes the work of a justice, including Rehnquist. As he puts it, "This is basically a reactive job. You take what comes and do the best you can." Nevertheless, one cannot read his opinions or speeches and miss the force of ideas, of history, of a jurisprudence of judging that informs his work.

That being so, the question arises: what views and doctrines has Justice Rehnquist sought to have the Court adopt? And to what extent has he succeeded?

Federalism

Rehnquist's efforts to have the Court respect the values of federalism have produced a mixed scorecard. Recalling how a 1942 opinion dismissed the 10th Amendment as a mere "truism," Rehnquist has succeeded in making the issue of state autonomy a serious question on the Court's agenda. The high water mark of this effort was *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which the majority decided that Congress may not exercise its commerce power in such a way as to displace functions essential to the states' "separate and independent existence."

National League of Cities was a bold stroke, but subsequent events revealed that Rehnquist lacked the votes to give his 10th Amendment views firm grounding. In case after case after 1976, a majority of the justices rebuffed federalism attacks on acts of Congress. Then, in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), a majority of five justices ruled that if the states "as states" want protection they must look to Congress, not the courts. *National League of Cities* was overruled. In a brief dissent, Rehnquist made it clear that he hoped some day to see *Garcia*'s demise. But for the moment, at least, that decision represents a rebuff to his efforts to give genuine content to the 10th Amendment.

Justice Rehnquist also found himself in dissent when the Burger Court began making increasingly active use of the dormant commerce clause to strike down state regulations affecting commerce. When the Court in 1981 struck down an Iowa law largely banning 65-foot double trailers on its highways, Rehnquist complained that the Court's opinion "seriously intrudes upon the fundamental right of the states to pass laws to secure the safety of their citizens." *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1981).

The Burger Court has been especially active in voiding state restraints on exports of a state's natural resources. In earlier cases, the Supreme Court had tended to sustain state preferences for local use of natural resources, but recent cases have struck down state restrictions on the export of such commodities as minnows, hydroelectric power and groundwater. Rehnquist would prefer a more deferential stance toward state policies, one that recognizes a state's "substantial interest" in preserving and regulating its resources.

Institutional reform

In line with his efforts to give local institutions breathing space in which to handle local problems, Rehnquist has sought to curb lower federal courts' equity powers in institutional reform litigation. Sometimes he has been successful, as in *Rizzo v. Goode*, 423 U.S. 362 (1976). There Rehnquist reversed a federal district court's order to the Philadelphia Police Department to submit a plan for dealing with complaints about police misconduct. Rehnquist rested his opinion squarely on considerations of federalism: the need to allow a local government agency to do its job without undue judicial interference.

In school desegregation cases, Rehnquist has had less success in curbing judicial power. Reviewing a district court order in Dayton, Ohio, Rehnquist ordered the case remanded in 1977 because of the disparity between the evidence of constitutional violations and the lower court's "sweeping remedy." *Dayton Board of Education v. Brinkman*, 433 U.S. 406.

Two years later, however, with two Ohio cases before the Court (one of them the same Dayton litigation), the majority took a generous view of lower courts' equity powers, affirming remedies that Rehnquist, in dissent, described as being "as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system." *Columbus Board of Education v. Penick*, 443 U.S. 449.

Two of the great battlegrounds of constitutional law, especially during the Warren and Burger eras, have been the due process and equal protection clauses of the 14th Amendment. Rehnquist has sought to limit the Court's expansive use of the clauses, but with limited success. *Paul v. Davis*, 424 U.S. 693 (1976), is perhaps Rehnquist's most noted effort to curb the due process clause. There he held that an interest in reputation urged by the plaintiff (who had been named by the local police as an "active shoplifter" in flyers distributed to local merchants) was neither "liberty" nor "property" protected by the due process clause. And in *Kelley v. Johnson*, 425 U.S. 238 (1976), Rehnquist used a deferential standard of review to reject a policeman's challenge to his department's regulating the length and style of his hair.

Despite Rehnquist's efforts, however, substantive due process has prospered in the Burger Court. Dissenting in *Roe v. Wade*, 410 U.S. 113 (1973), Rehnquist argued in vain that the 14th Amendment's drafters never intended to withdraw from the states the power to regulate abortions.

In a heated dissent from a 1977 decision invalidating New York restrictions on the sale and distribution of contraceptives to minors, Rehnquist thought it "not difficult" to imagine the reaction of the framers of the 14th Amendment if they could have lived to see "enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors." Rehnquist likewise has dissented from the Court's use of heightened due process review of laws affecting marriage and the family.

Sex discrimination

The Burger Court has been less fond of the equal protection clause than was the Warren Court. But in at least one notable area—gender discrimination—the Court in recent years has vastly expanded the opportunities for judicial intervention. In gender cases, Rehnquist has fought, in effect, a series of delaying actions. In *Craig v. Boren*, 429 U.S. 190 (1976), Rehnquist, dissenting, argued for the application of the traditional rational basis test in reviewing allegations of gender discrimination, but the majority opted for a higher level of scrutiny.

Applying an "intermediate" level of review, Rehnquist has written opinions rejecting an attack on California's statutory rape law (punishing the male but not the female participant) and upholding a federal statute authorizing the president to require the draft registration of males but not females. Gender discrimination cases have separated Rehnquist from his conservative colleague, Justice O'Connor, who in a 1982 opinion (from which Rehnquist dissented) shaped perhaps the Court's most rigorous gender discrimination language to date. *Mississippi University for Women v. Hogan*, 458 U.S. 718.

In First Amendment cases, Rehnquist tried but failed to prevent the Court from bringing commercial speech under the Amendment's umbrella. Dissenting in *Virginia Pharmacy v. Consumer Council*, 425 U.S. 748 (1976), Rehnquist complained that the decision elevated commercial intercourse "between a seller hawking his wares and a buyer seeking to strike a bargain" to the same plane as the "free marketplace of ideas."

In religion cases, Rehnquist has objected in strong terms to the Court's use of Thomas Jefferson's "misleading metaphor" to decree a wall of separation between church and state. Relying on his reading of the framers' intentions, Rehnquist argues that the Constitution does not require government to be neutral "as between religion and irreligion."

Rehnquist has left an unmistakable stamp on criminal justice cases. Hints dropped in early Rehnquist opinions for a good-faith exception to the exclusionary rule have taken root. Rehnquist has pushed successfully for other limitations on the rule's reach, such as the inevitable discovery and public safety exceptions that he spelled out in *New York v. Quarles*, 467 U.S. 649 (1984). Similarly, he has been able in recent opinions to restrict the scope of *Miranda* requirements and the penalty for non-compliance. Rehnquist also has written opinions curtailing standing to assert exclusionary claims, such as the Court's 1978 decision that passengers in an automobile lack standing to challenge the search of a glove compartment. *Rakas v. Illinois*, 439 U.S. 128 (1978).

Fourth Amendment

In Fourth Amendment cases, Rehnquist has expanded the scope of allowable searches by restricting the definition of what constitutes legitimate expectations of privacy or by balancing the privacy claim against societal or police efficiency interests. A central theme is deference to, and a presumption of the validity of, police actions. Illustrative Rehnquist opinions are *INS v. Delgado*, 466 U.S. 210 (1984), holding that cordoning off a factory and interviewing workers is not a "seizure," and *Illinois v. Gates*, 462 U.S. 213 (1983), abandoning the *Aguilar-Spinelli* test for assessing informants' tips for a more relaxed "totality of the circumstances" approach.

When prisoners have asked federal courts to intervene in prison administration, Rehnquist consistently has deferred to the discretion of prison administrators, writing a number of the Court's major opinions in this area. Similarly, in habeas corpus cases Rehnquist has taken a restrictive line. Rehnquist's major habeas corpus decision is *Wainwright v. Sykes*, 433 U.S. 72 (1977), which instituted a "cause and prejudice" standard for failure to object during a state court trial, a standard that makes federal habeas more difficult to obtain. By limiting habeas availability to claims of guilt or innocence, Rehnquist seeks to promote the effective administration of justice, finality in criminal proceedings, and minimization of friction between state and federal courts.

Section 1983 has been the font of many claims that some justices, Rehnquist among them, consider picayune and meritless. Rehnquist has led the effort to curb the uses of 42 U.S.C. §1983. In 1981, he found that the availability of an adequate state remedy foreclosed a Section 1983 cause of action. *Parratt v. Taylor*, 451 U.S. 527. In 1986 he brought together a majority to hold that the mere negligence of a state official is not enough to sustain a Section 1983 action. *Daniels v. Williams*, 106 S.Ct. 662.

A review of Justice Rehnquist's opinions reveals that no one on the Court writes with more style, force or assurance. It is hard to match Rehnquist's agility in shaping a record and marshaling arguments to reach a conclusion.

One is struck by the recurrence of certain basic themes. Prominent among these is federalism—a belief that federal intervention into the affairs of a state requires convincing justification and ought to be the exception to the rule. Other themes include an adherence to the framers' original intent, a skepticism about judges setting out to solve social problems, a deference to legislative judgments and to the political process, and a belief that judicial review ought to be kept well within defined bounds.

In each Supreme Court era, there have been justices who tended to shape the ground on which the issues were debated—Black and Frankfurter are examples. In the Burger Court, Justice Rehnquist has gone from being the "lone dissenter" to being a key fighter in many of the major battles. Sometimes he wins, sometimes he loses. But when the history of the present Court is written, Justice Rehnquist will be recognized as a catalyst to many of that tribunal's great struggles.

—Journal

Statement on Behalf of

The Honorable William H. Rehnquist
Associate Justice of the Supreme Court

For

Chief Justice of the Supreme Court of the United States

Before the Senate Judiciary Committee
July 29, 1986

Submitted by:

Mr. Ordway P. Burden
Chairman
National Law Enforcement Council
Suite 804
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

Senator Thurmond, and Members of the Senate Judiciary Committee, the National Law Enforcement Council, an umbrella group representing, through their executive heads, fourteen national law enforcement organizations, wishes to be on record in favor of President Reagan's nomination of U.S. Supreme Court Associate Justice William H. Rehnquist for Chief Justice of the Supreme Court. We believe Judge Rehnquist's fifteen years as an Associate Justice of the Supreme Court, his experience as Assistant Attorney General of the United States, as an active and successful attorney in private pratice, and his experience as a law clerk to a Supreme Court Justice, give the nominee the extensive background and experience we look for in our Chief Justice.

Judge Rehnquist demonstrated early in life an outstanding ability to learn, understand, and apply the law. As a student, he always stood first in his class. This was true in his secondary school years where he stood out as an outstanding student. He graduated first in his class at Stanford Law School in 1952 after receiving his B.A. "with great distinction", earning him election into the highest academic fraternity, Phi Beta Kappa. He also earned advanced degrees from Stanford and Harvard Universities.

Few have ever attempted to question this man's intellectual ability, or his understanding of the law, its application to the rights of our citizens, and the meaning of our Constitution as it applies to the rights of every citizen to protection under the laws of our country.

As members of the law enforcement/criminal justice community sworn to provide protection for every citizen against violence and rights guaranteed by laws and the United States Constitution, we feel that Judge Rehnquist has demonstrated his ability to interpret and write his findings in legal cases to protect the citizens of this great land of ours. We believe that his high intelligence and demostrated knowledge of the beliefs of our founding fathers as we know them in our Constitution, will help advance the needs of our law enforcement community to be able to act quickly, when necessary, to protect our citizens against law breakers, and violence associated with those that do not believe in upholding our laws.

This statement is being made on behalf of the following national law enforcement criminal justice organizations who have given their unanimous approval for this statement to be submitted to the Senate Judiciary Committee on behalf of Judge Rehnquist to be Chief Justice of the United States Supreme Court.

Associations of Federal Investigators
Federal Criminal Investigators Association
FBI National Academy Associates
Fraternal Order of Police
International Union of Police Associations

Law Enforcement Assistance Foundation
National Association of Police Associations
National District Attorneys Associations
National Sheriffs' Association
National Troopers Coalition
Society of Former Special Agents of the FBI
Victims Assistance Legal Organization
International Association of Chief of Police
Airborne Law Enforcement Association

8/11/86

To Whom It May Concern:

I want to state that I was in charge of Maricopa County Democratic Hdqts. in Phoenix, Ariz. on election day 1964. I was called on the phone by Charles Pine to tell me voters were being challenged in several precincts in South Phoenix. I asked if it was any one we knew & what were they doing. I was told it was William "Bill" Rehnquist for one he was asking the people standing in a long line waiting to vote, to read printing on a white card(.) People were leaving the lines and were not voting. I sent 2 or 3 attorneys down to help solve the problems & I believe the F.B.I. was called in. I also had calls from Izora Hill a precinct committeeman a black women who said her people were frightened and afraid to vote. I also was called by Tony Abrail and Manuel Pena. I was told by one of the attorney's it was William "Bill" Rehnquist and some one else whom I did not know.

We had a big Registration drive that year and a lot of the People were voting for the first time after the challenging started we no longer had people waiting in line the voting was real slow. I tried to get the precinct people to go door to door to get out the vote but word was out they were afraid to vote.

The Democrat Hdqts. was located at 2144 E Roosevelt Phoenix Ariz. Harold Scoville was county chairman. I was vice county chairwoman.

I would like to state that the former county chairman Vince Maggori was not present nor did he appear at any time, he was not active in any way.

The statements I have made are true. I have nothing to gain by making these statements, but I think the Truth is very important.

/s/ Frances M. Archer

Signed before me, 8/12/86

/s/ Mary L. Russell
Notary Public - State of Oregon
Comm. Expires 7-13-87

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

September 3, 1986

The Honorable Strom Thurmond
Chairman
Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Strom:

After the conclusion of the Rehnquist nomination hearings, three affidavits were submitted which bear on the issue of allegations of challenging voters. I request that they be made a part of the record. They have previously been circulated to members of the Committee.

Thank you for your cooperation.

Sincerely,

Howard M. Metzenbaum
United States Senate

FINN AND FINN
ATTORNEYS AT LAW

HERBERT B. FINN (1910-1979)
RUTH G. FINN

301 W. INDIAN SCHOOL, SUITE 102
PHOENIX, ARIZONA 85013
TELEPHONE (602) 264-1351

AFFIDAVIT

STATE OF ARIZONA)
)
County of Maricopa)

I, RUTH G. FINN, being first duly sworn, states and alleges as follows:

I am the widow of Herbert B. Finn, who practiced law in Phoenix, Arizona from approximately 1950 until his death in 1979.

At some time in the early or mid 1960's, on election day, at about time for the polls to close or a few minutes thereafter, my husband received a phone call. He answered said call in my presence and became very excited and upset. Upon hanging up he told me that the call concerned black voters in a South-side precinct.

He explained that he was told that there were long lines of people waiting to vote who were being denied the right to vote.

My husband then left the house and upon his return he referred to Bill Rehnquist's efforts to close the polls on the long lines of black voters. He stated that he had never seen such long lines at closing time. It was the custom at this time to close the polls to additional voters at the closing hour but to permit voters who were already in line to vote.

When Judge Rehnquist's name came up for his Supreme Court nomination, my husband exclaimed, "That's the ------------- who tried to close the polls on the black voters."

Where was no possibility of mistaken identity. Phoenix was a smaller town during the voting line incident and I believe my husband knew all of his fellow practicing ttorneys by sight.

At the time of the voting incident and during our conversation when Judge Rehnquist's name came up for Supreme Court nomination, my husband spoke of Judge Rehnquist as someone whom he knew personally and with whom he had had previous contact.

Ruth G. Finn

Ruth G. Finn - Affiant

SUBSCRIBED AND SWORN to before me, the undersigned Notary, this 12th day of August, 1986, by RUTH G. FINN.

Maryalice Darling

Notary Public

My Commission Expires:

My Commission Expires Mar. [illegible], [illegible]

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

My name is Susan B. Perkins. I live at 2441 W. Adams Street, Phoenix, Arizona.

On Election Day, 1964, I was a Democratic booth worker at Jackson Precinct.

Sometime in the early afternoon, a man came to the Precinct and began challenging the right to vote of some voters. I remember telling people later that he acted like "a Storm Trooper".

The polls were to close at 7:00 p.m., but by that time there was still a long line of voters waiting to vote. The rule was that they could vote as long as they were in line at 7:00 p.m.

The same man who had been there earlier came back and started telling people to go home -- that it was too late to vote.

I made a phone call to Mr. Herb Finn, a lawyer who had always helped us.

He got there in a few minutes and had words with the man.

I could tell Mr. Finn knew the man and he told him he was wrong and the people could vote.

The man finally left and everybody got to vote.

I didn't know who the man was then. But I knew I would never forget his face. When I saw his picture in the paper when he went to the Supreme Court, I saw that the man was William Rehnquist.

Susan B. Perkins

Subscribed and sworn to before
me this 13th day of August, 1986.

Notary Public

My Commission expires: My Commission Expires July 31, 1988

United States Senate
WASHINGTON, DC 20510

September 3, 1986

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
SD-224

Dear Strom:

Enclosed are questions submitted by me to Justice Rehnquist and his responses thereto. I would ask that you make them part of the hearing record.

Thank you for your courtesy in this matter.

Sincerely,

Carl

Carl Levin

CL/dr
Enclosures
cc: Members of the Judiciary Committee

ANSWERS TO QUESTIONS SUBMITTED BY SENATOR LEVIN

QUESTION:

1. A memo you prepared during your clerkship for Associate Justice Robert H. Jackson has been widely reported in the press and came up during your initial confirmation to the Court in 1971. In it, you argued that the "separate but equal" doctrine the Supreme Court had laid down in Plessy v. Ferguson "was right and should be reaffirmed." You also wrote: "To the argument made by Thurgood, not John, Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are."

In a letter to then-Chairman of the Judiciary Committee, Senator Eastland, written shortly before the Senate voted on your confirmation and quoted in the New York Times, July 6, 1986, you explained that "the memorandum was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of *his* views at the conference of the justices, rather than as a statement of my views."

I would appreciate your telling me, to the best of your recollection, how you know that the views expressed in the memo were those of Justice Jackson. Did Justice Jackson discuss the "separate but equal" doctrine with you prior to your preparing this memo and, if so, did your memo reflect this discussion? Did you base your formulation of his views on anything he had previously written about "separate but equal?"

If, as you stated in the letter to Senator Eastland, the memo was intended as a statement of Justice Jackson's views and not your own, did it *also* reflect your views at that time?

ANSWER:

In my 1971 letter to Senator Eastland, I stated that I then recalled considerable oral discussion with him as to what type of presentation he would make when the school segregation cases came before the Court conference. I also recalled in the 1971 letter Justice Jackson's concern that the conference have the benefit of all of the arguments in support of the constitutionality of the "separate but equal" doctrine, as well as those against its constitutionality. While I have no recollection today of the specific content of these oral discussions on the separate but equal doctrine, I continue to adhere to the view expressed in my 1971 letter that I prepared the memo after such oral discussions with Justice Jackson and that the memorandum was intended to reflect the views that he had expressed in those discussions. I do not recall basing the memorandum on anything that Justice

Jackson had previously written about the "separate but equal" doctrine, although much of the substance of the memo reflects views that he had expressed in his book "The Struggle for Judicial Supremacy."

Finally, as I stated in my 1971 letter and reiterated in my hearing before the Judiciary Committee, the statement in the memorandum that "Plessy v. Ferguson was right and should be reaffirmed" did not then and does not now reflect my view.

QUESTION:

2. In an article which appeared in the New York Times Magazine of March 3, 1985, you are quoted as saying: "So I felt that at the time I came on the Court, the boat was kind of heeling over in one direction. Interpreting my oath as I saw it, I felt that my job was, where those sort of situations arose, to kind of lean the other way."

Should a Supreme Court Justice seek through his or her decisions to achieve an overall ideological balance on the Court by overcompensating to one side if in his or her view other Justices are leaning too much the other way?

ANSWER:

No.

QUESTION:

3. Would you say that it has been "often", "sometimes" or "rarely" during your tenure on the court that you have changed your mind about a case either during oral arguments or during the conference of Justices?

ANSWER:

Of the three terms offered in your question, I would have to select "sometimes."

QUESTIONS SUBMITTED BY SENATOR LEVIN

QUESTION:

1. In the memo you say you prepared for Justice Jackson entitled "A Random Thought on the Segregation Cases," you wrote: "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think Plessy v. Ferguson was right and should be reaffirmed."

In your reply to my first letter, you restated what you had said in your 1971 letter to Senator Eastland, that the memorandum was intended to reflect the views that Justice Jackson had expressed in oral discussions you had with him. Did Justice Jackson tell you during these oral discussions that he had been "excoriated by 'liberal' colleagues" for his views on Plessy v. Ferguson? If so, please elaborate. If not, when did he tell you that he had been "excoriated by 'liberal' colleagues" for these views? Please be specific. If he didn't tell you, then on what basis did you include this line in the memo?

ANSWER:

As I indicated in my answer to your question of July 23, 1986, I have no recollection today of the specific content of my oral discussions with Justice Jackson relating to the points that he tentatively intended to make at the Court's Conference on the Brown case. I do not recall Justice Jackson telling me in those discussions that he had been "excoriated by liberal colleagues" for his views on the Brown case. It is my strong sense, however, that Justice Jackson acknowledged during our discussions that he fully expected to be criticized sharply by some of his colleagues if he took the position that Plessy v. Ferguson should be reaffirmed.

QUESTION:

2. During the recent Judiciary Committee hearings, Senator Leahy asked you if you had "any second thoughts" about your decision not to disqualify yourself in the Tatum v. Laird case. You replied: "I never thought about it again until these hearings, to tell the truth." Later you stated to Senator Leahy that "Justice Stewart . . . after I wrote this opinion . . . told me that in some respects he thought my comparison of the ABA standards and the statutory standards was incorrect and that the ABA standards had intended to be more stringent."

Having heard Justice Stewart's comments and having now had a chance to reread the ABA standards in effect in 1972, do you still believe that the 1972 ABA standards were not "materially different from the standards enunciated in the congressional statute" in effect at that time?

ANSWER:

I think that the 1972 ABA standards were materially different from the provisions of 28 U.S.C. 455, as it stood in 1972, on the question of disqualification for financial interest. I believe it was this point to which Justice Stewart comments to me were addressed. In so far as disqualification for bias is concerned, the language of the canons is phrased differently from the relevant language of section 455, and could require a result different from that required under section 455 in a particular case.

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(Partial Listing)

September 4, 1986

The Honorable Strom Thurmond
United States Senate
218 Russell Senate Office Building
Washington, DC 20510

Dear Senator:

Please find enclosed a copy of the testimony the UNITED STATES JUSTICE FOUNDATION is hereby submitting to the United States Senate concerning the nomination of Judge Antonin Scalia as Associate Justice and the nomination of Associate Justice William Rehnquist as Chief Justice of the United States Supreme Court.

Thank you for your time.

Sincerely,

Gary G. Kreep
Executive Director
United States Justice Foundation

Enclosure

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September 4, 1986

Senator:

The United States Justice Foundation is a non-profit California corporation dedicated to the providing of legal assistance to individuals and businesses harassed by government agencies, government rules and government supported, so-called, "private" organizations. We, therefore, are vitally interested in the composition of the United States Supreme Court and the decisions which result from its make-up.

Our original intention was to present oral testimony at the Senate Judiciary Committee's Hearing on the nominations of Judge Scalia and Justice Rehnquist. However, due to the severe limitation on the number of persons allowed to speak at the hearings, we were unable to do so. Thus, this submission of written testimony.

Although not affiliated with any political party, the United States Justice Foundation, its Board of Directors, its participating attorneys, and its contributors and supporters have a decidedly conservative bent.

Responses to inquiries to our supporters have shown them to be, overwhelmingly, supporters of President Reagan and his policies. Our polls of them have shown them, again

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overwhelmingly, to be in favor of a conservative nominee to any vacancy on the United States Supreme Court. The undertone of the response was that any conservative that the President nominated was acceptable.

The point is that they, and we, believe that it is essential for the survival of our civil, property, and human rights that persons nominated to the United States Supreme Court be of a conservative ideological philosophy.

We believe that it is imperative that such nominees hold the same philosophy as President Reagan on such issues as governmental intrusion into economic and personal freedoms, busing, abortion, school prayer, and criminal law, if the outrageous precedents that have been set by previous Supreme Courts are to be overturned. We believe that the nominations of Judge Scalia to the Supreme Court and Associate Justice Rehnquist as Chief Justice of the United States Supreme Court meet these criteria.

Thank you for your attention.

Respectfully submitted

Gary G. Kreep
Executive Director
United States Justice Foundation

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